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Supreme Court of the United States

IN RE GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether the South Carolina Supreme Court may refuse to enforce this Court's mandate and thereby deny petitioner its rights as provided for in the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and as determined by this Court in *Green Tree Financial Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003).

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are: Chief Justice Jean Hoefer Toal, Supreme Court of South Carolina; Justice James E. Moore, Supreme Court of South Carolina; and Justice John H. Waller, Jr., Supreme Court of South Carolina. The additional parties to the proceeding are listed in the caption of the decision of the Supreme Court of South Carolina. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corporation states the following: When this case first came before this Court, Petitioner Green Tree Financial Corporation (then known as Conseco Finance Corporation) was a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock was publicly traded. On December 17, 2002, Conseco Finance Corporation filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court"). In connection with its bankruptcy proceedings, substantially all of the assets of Conseco Finance Corporation were sold to General Electric Credit Corporation and a newly-formed entity, Green Tree Investment Holdings, LLC. This cause of action, however, remained with the bankruptcy estates of Conseco Finance Corporation and its affiliated entities. On September 9, 2003, the Bankruptcy Court confirmed a liquidating plan of reorganization for Conseco Finance Corporation and its affiliated entities. On September 15, 2003, this plan became effective and the Conseco Finance Corporation post-consummation estate (the "CFC Estate") received the remaining cash and other assets of Conseco Finance Corporation in trust for the benefit of the creditors of Conseco Finance Corp. Thus, the Petitioner in this case is actually the CFC Estate, which is a liquidating trust administered by a plan administrator, Bridge Associates, LLC, which is prosecuting the action on behalf of the creditors of Conseco Finance Corporation.

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PETITION FOR WRIT OF MANDAMUS

Petitioner Green Tree Financial Corp. ("Green Tree") respectfully requests that this Court grant its petition for a writ of mandamus to the Supreme Court of South Carolina.

OPINIONS BELOW

The order and opinion of the Supreme Court of South Carolina dated February 20, 2004 is unpublished and appears in the Appendix to this Petition ("Pet. App.") at 1a-4a. A copy of this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), is reproduced at Pet. App. 5a-19a.

JURISDICTION

Last Term, this Court issued its decision in *Green Tree Financial Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), vacating the judgment of the Supreme Court of South Carolina and remanding for further proceedings before the arbitrator. On remand, the Supreme Court of South Carolina refused to enforce the mandate of this Court by denying Green Tree's motion to vacate the arbitral awards and judgments that were the subject of the Supreme Court of South Carolina's prior judgment. This Court possesses jurisdiction to enforce the integrity of its decisions and mandates pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

RELEVANT STATUTORY PROVISIONS

The All Writs Act, 28 U.S.C. § 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate

commerce. Sections 9 and 10 of the FAA set forth the procedures for confirming and vacating arbitral awards obtained pursuant to agreements governed by the FAA. Sections 2, 9, and 10 of the FAA are reproduced in their entirety at Pet. App. 23a-25a.

STATEMENT OF THE CASE

Petitioner Green Tree Financial Corporation respectfully requests that a writ of mandamus issue to compel compliance with this Court's mandate in *Green Tree Financial Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003). In that case, this Court held that Green Tree was entitled to, but had not yet obtained, a determination by the arbitrator whether its arbitration agreements permitted class arbitration. As a result, the Court ruled that the decision of the South Carolina Supreme Court affirming the multi-million dollar class-wide arbitral awards against Green Tree must be vacated. Despite this Court's ruling, the Supreme Court of South Carolina has treated this Court's decision as a virtual nullity. Mandamus is required to ensure the integrity of this Court's decision-making process by requiring that its decisions be followed by courts whose judgments this Court reviews.

Specifically, the South Carolina Supreme Court has refused to vacate the underlying arbitration awards and judgments even though this Court ruled that those awards were obtained in violation of the Federal Arbitration Act ("FAA"). Indeed, the Supreme Court of South Carolina has even questioned whether Green Tree prevailed before this Court – "Green Tree now claims that they prevailed in the [United States Supreme Court]" – and has squarely denied "Green Tree's motion to vacate and remit" the arbitral awards and judgments that this Court made clear were entered in violation of the requirements of the FAA. Pet. App. 3a.

Instead, Supreme Court of South Carolina has adopted an unprecedented procedure whereby the prior judgments resulting from the arbitrators awards – awards that this Court

ruled were obtained without giving Green Tree the benefit of its bargain under the arbitration agreements – remain in full effect in direct violation of this Court's decision. The FAA makes plain that a court judgment confirming an arbitration award can only be entered *after* there has been a valid arbitration award. See 9 U.S.C. § 9. What is more, under the lower court's opinion, further proceedings *after* the arbitrator has acted will *not* be subject to the procedures guaranteed in Sections 9 and 10 of the FAA, but instead any findings of the arbitrator are to be sent "directly to [the South Carolina Supreme] Court for," what the court below contends are, "further proceedings not inconsistent with the [United States Supreme Court's] opinion." Pet. App. 3a-4a.

The Supreme Court of South Carolina's actions are directly contrary to this Court's mandate in two ways. First, by failing to vacate the underlying court judgments, the South Carolina Supreme Court appears intent upon preserving judgments that confirm class-wide arbitral awards, even though this Court has ruled that the original arbitral awards were entered in violation of the FAA. As a result, Green Tree has been denied access to substantial funds that were necessary to secure bonds to allow Green Tree to appeal the decisions below. Moreover, by refusing to vacate the judgments, the Supreme Court of South Carolina has left in effect the post-judgment interest that has accrued on the original court judgments – totaling more than $8 million – even though Green Tree prevailed on appeal in showing that the underlying arbitral awards violated the FAA.

Second, the lower court's insistence upon preserving the original judgments and its requirement that all proceedings after the arbitrator issues his findings take place in the South Carolina Supreme Court means that Green Tree will be denied its bargained-for rights as determined by this Court. What is more, the lower court's action is contrary to the post-arbitration proceedings guaranteed by Sections 9 and 10 of the FAA. The South Carolina Supreme Court previously has

made clear that the parties' arbitration agreements are governed by the FAA, and the FAA sets forth an orderly process that allows parties the opportunity to protect their rights in the trial courts *after* the entry of an arbitral award. To be sure, the FAA does not require that the arbitrator recreate all of the proceedings that led to the initial invalid judgments. What the FAA makes clear, however, is that with regard to any new awards, the parties may seek to confirm the award, 9 U.S.C. § 9, or they may seek to vacate the award, *id.* § 10, but such relief must be sought in the first instance in the trial court and such relief may be sought only *after* an arbitral award has been entered.

Under these circumstances, mandamus relief is imperative. As this Court has explained, where a lower court "mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled . . . by a writ of mandamus to execute the mandate of this Court." *General Atomic Co.* v. *Felter*, 436 U.S. 493, 497 (1978) (per curiam) (internal quotation marks omitted; omission in original). Thus, where, as here, the lower court "has again done precisely what [this Court] held that it lacked the power to do," *id.* at 496, this Court's precedents dictate that the lower court should be instructed to "conform" to this Court's "previous judgment," *id.* at 497. In short, action by this Court is necessary to ensure that its mandate is respected and followed.

Green Tree comes to this Court as a last resort. It first sought relief from the South Carolina Supreme Court to enforce this Court's mandate. Those efforts have been rejected in a decision that (i) reflects no analysis of this Court's decision, (ii) addresses none of Green Tree's arguments, (iii) contains no citation to any South Carolina or federal authority, and, (iv) most importantly, cannot be squared with the decision and mandate of this Court.

To ensure the uniform application of federal law, this Court's decisions must be enforced. Accordingly, Green Tree

respectfully requests that a writ of mandamus be issued to ensure full compliance with the mandate of this Court.

Background

This case was before this Court last Term in connection with the issue whether imposition of class arbitration on arbitration agreements that did not provide for class arbitration was consistent with the Federal Arbitration Act. This Court ruled in favor of Green Tree and vacated the decision below. Despite that ruling, the Supreme Court of South Carolina has refused to give substantive effect to the Court's mandate and decision.

Proceedings Prior To This Court's Decision. As described in detail in this Court's opinion in *Green Tree* v. *Bazzle*, this dispute arose out of certain loan agreements entered into by Green Tree with various individuals in South Carolina. Each of those agreements contained an arbitration provision that required the parties to submit to mandatory arbitration all disputes arising from such agreements. As this Court recognized, by its terms, the arbitration agreements at issue provide that they "'shall be governed by the Federal Arbitration Act.'" Pet. App. 6a (quoting arbitration agreement). Despite the provisions requiring mandatory arbitration, two lawsuits – the *Bazzle* case and the *Lackey* case – were filed in state court by individuals seeking statutory damages based upon claims that Green Tree failed to make certain statutory disclosures mandated by South Carolina law.

As explained by this Court, in the *Bazzle* case, the trial court "both (1) certified a class action and (2) entered an order compelling arbitration." Pet. App. 7a. The arbitrator, in turn, administered the class action ordered by the court and "eventually awarded the class $10,935,000 in statutory damages, along with attorney's fees." *Id.* Applying Section 10 of the FAA, the trial court rejected Green Tree's motion to vacate and "confirmed the award." *Id.* Similarly, in the

Lackey case, the same arbitrator conducted a class arbitration and "ultimately ruled in favor of the class, and awarded the class $9,200,000 in statutory damages in addition to attorney's fees." *Id.* at 8a. Applying Section 10 of the FAA, the trial court likewise rejected Green Tree's motion to vacate and confirmed this arbitral award. *Id.*

Green Tree sought relief in state court and eventually petitioned the Supreme Court of South Carolina to vacate the arbitral awards because, under the parties' contracts, "class arbitration was legally impermissible." Pet. App. 8a. That court rejected Green Tree's challenge and ruled that the underlying arbitration "contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form." *Id.* As a result, the South Carolina Supreme Court "AFFIRM[ED] the arbitrator's awards in both cases." *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 363 (S.C. 2002).

On October 23, 2002, Green Tree filed a petition for certiorari with this Court. On December 17, 2002, while that petition was pending, Green Tree, along with its parent company, Conseco, Inc., and a number of their affiliates, filed chapter 11 petitions in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court"). With the filing of those petitions, the automatic stay of 11 U.S.C. § 362 was imposed on all proceedings against Green Tree. On January 10, 2003, this Court granted Green Tree's petition for certiorari. Plaintiffs argued that the petition should be dismissed as a violation of the automatic stay, but on January 21, 2003, the Bankruptcy Court lifted the automatic stay for the limited purpose of permitting Green Tree to prosecute its appeal to this Court.

While this case was pending before this Court, plaintiffs sought to satisfy the "judgments" they obtained in the South Carolina courts by executing on the supersedeas bonds that had secured Green Tree's appeals from the South Carolina Circuit Courts to the South Carolina Supreme Court. On

February 25, 2003, plaintiffs filed a motion in the Bankruptcy Court to lift the automatic stay and allow them to execute on the bonds. The Bankruptcy Court, noting that the appellate process had not yet been completed, denied that motion on March 10, 2003.

This Court's Decision. On the merits, this Court determined that the South Carolina Supreme Court's decision violated the Federal Arbitration Act. In a plurality opinion by Justice Breyer, the Court concluded that the question "whether the arbitration contracts forbid class arbitration" was a matter of "contract interpretation . . . for the arbitrator, not the courts, to decide." Pet. App. 11a.

Thereafter, the plurality explained, in no uncertain terms, that "[w]ith respect to this underlying question—whether the arbitration contracts forbid class arbitration—the parties have not yet obtained the arbitration decision that their contracts foresee." Pet. App. 11a. "[A]s concerns the *Bazzle* plaintiffs, the South Carolina Supreme Court wrote that the 'trial court' issued 'an order granting class certification.'" *Id.* With regard to the *Lackey* case, the Court stated that "there is at least a strong likelihood" that "the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation." *Id.* at 12a. Given these facts, the Court instructed that there be further proceedings in arbitration in which the arbitrator must "decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms. 9 U.S.C. § 2; *Volt*, *supra*, at 478-479." *Id.* To enforce this holding, the Court ruled that "[t]he judgment of the South Carolina Supreme Court is vacated, and the case is remanded for further proceedings." *Id.*[1]

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[1] The Chief Justice, joined by Justices O'Connor and Kennedy, expressed their view that the arbitration agreements, by their terms, precluded class arbitration and therefore the South Carolina Supreme Court's judgment affirming the arbitral awards should be reversed outright without any need for further proceedings before the arbitrator regarding class-wide

Proceedings To Enforce This Court's Mandate. After this Court's decision, on July 10, 2003, plaintiffs asked the Bankruptcy Court for "clarification" of whether the Bankruptcy Court's January 21, 2003 order permitted prosecution of this case on remand. The Bankruptcy Court informed plaintiffs that its prior order did not permit prosecution of the case on remand, and that the automatic stay barred all further proceedings in the case. On the same day, July 10, 2003, the South Carolina Supreme Court issued an order that assigned a South Carolina Circuit Court judge to preside over all disputes relating to the supersedeas bonds. The South Carolina Supreme Court took this action without giving prior notice to Green Tree, and without any pending motion before it.

On August 6, 2003, plaintiffs filed a declaratory judgment action in South Carolina seeking to maintain the bonds. On the same day, August 6, 2003, the Deputy Clerk of the South Carolina Supreme Court issued a letter returning the proceedings to the arbitrator in this case. Pet. App. 2a. The South Carolina Supreme Court once again took this action without giving prior notice to Green Tree, and without any pending motion before it. Even though the Bankruptcy Court informed plaintiffs that there was an automatic stay in effect, on August 7, 2003, counsel for plaintiffs wrote a letter to the arbitrator asking him to proceed with the *Bazzle/Lackey* arbitrations. Although this Court ruled that on the question "whether the arbitration contracts forbid class arbitration . . . the parties have not yet obtained the arbitration decision that their contracts foresee," *id.* at 11a, plaintiffs' counsel told the arbitrator that his "prior orders made clear that you already independently determined, based upon your own examination of the adhesion contract documents drafted by Green Tree,

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arbitration. Pet. App. 14a (Rehnquist, C.J., joined by O'Connor & Kennedy, JJ., dissenting) ("the holding of the Supreme Court of South Carolina contravenes the terms of the contract and therefore is pre-empted by the FAA").

that the arbitration contract was silent with regard to class arbitration and that such silence authorized class arbitration." Letter from Steven W. Hamm, to Hon. Tom J. Ervin, Arbitrator at 1 (Aug. 7, 2003). Counsel for Green Tree received plaintiffs' letter on August 11, 2003, and immediately wrote the arbitrator to inform him that "the automatic stay is still in place and that any efforts to pursue a claim against [Green Tree] constitutes a violation of the stay." Letter from Herbert W. Hamilton, to Thomas J. Ervin, Arbitrator 1 (Aug. 11, 2003).

Even though this Court had just determined that the parties had *not* received an independent arbitrator decision on the question of class arbitration, the arbitrator adopted in full plaintiffs' argument that the "prior Orders in Arbitration were clear that I made an independent determination based upon my review of the testimony and evidence presented and the applicable law that these cases were properly subject to class arbitration." Letter from Tom J. Ervin, Arbitrator, to Herbert Hamilton, Steven W. Hamm, Bradford P. Simpson, and Daniel W. Williams, at 1 (Aug. 13, 2003). Despite this Court's determination that further proceedings before the arbitrator were required, the arbitrator stated that "no further proceedings in arbitration were necessary in this matter," *id.*, and simply signed the proposed order offered by plaintiffs which states that he "concluded that since the arbitration clause was silent as to class treatment that class certification was appropriate" and that he "reached this decision independently in arbitration without influence from any other court ruling." *Green Tree Fin. Corp.* v. *Bazzle*, No. 02-634, slip op. at 1 (Aug. 12, 2003) (Order of the Arbitrator on Remand). Finally, in an effort to deny any effect to this Court's ruling, the arbitrator further adopted plaintiffs' proposal that his order be issued "*nunc pro tunc*, retroactive to my initial Order in Arbitration." *Id.*

On August 13, 2003, after an emergency hearing, the Bankruptcy Court with jurisdiction over the Conseco

bankruptcy proceeding issued an order providing that the "arbitration award of August 12, 2003, in the *Bazzle/Lackey* arbitrations is void as a violation of the automatic stay." *In re Conseco, Inc.*, No. 02 B 49672, slip op. at 2 (Bankr. N.D. Ill. Aug. 13, 2003) (order voiding award).[2] On September 9, 2003, the Bankruptcy Court confirmed a liquidating plan of reorganization for Green Tree's successor, Conseco Finance Corporation. That plan became effective on September 15, 2003. Thus, the automatic stay terminated on that date. Prosecution of this action was still barred, however, because the plan of confirmation contained a post-confirmation injunction. On September 15, 2003, the Bankruptcy Court also ruled that the South Carolina Supreme Court's Order remanding this case to the arbitrator and the arbitrator's subsequent actions violated the automatic stay and that those actions were null and void. Pet. App. 3a. On December 18, 2003, the bankruptcy court lifted its injunction on further proceedings designed to effectuate this Court's mandate.

On December 18, 2003, Green Tree filed with the South Carolina Supreme Court a motion to vacate and remit. Green Tree demonstrated that this Court's decision and mandate required the underlying judgments that affirmed the arbitral awards be vacated. In particular, Green Tree showed that this Court's decision determined that there had yet to be any valid decision that the arbitrations could proceed on a class-wide basis. As a result, the class-wide arbitration awards – which applied to a class of thousands of individuals – were themselves invalid. Put another way, Green Tree informed the South Carolina Supreme Court that "if," as this Court

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[2] At the hearing leading up to its August 13, 2003 order, the Bankruptcy Court expressed its view that the letter sent by plaintiffs' counsel informing the arbitrator to proceed notwithstanding the automatic stay, was "outlandish," and that the court was "truly dumbfounded that they could send a letter that is so completely contrary to my order and my oral statement." Hearing Tr. at 71:1-4, *In re Conseco, Inc.*, No. 02 B 49672 (Bankr. N.D. Ill. Aug. 13, 2003).

made plain, "there was no valid decision allowing class arbitration, then there was no valid basis on which the arbitrator could award class-wide relief." Motion to Vacate and Remit at 13, *Bazzle* v. *Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed Dec. 18, 2003). Accordingly, Green Tree requested that the South Carolina Supreme Court vacate the judgments confirming the arbitral awards.

Green Tree further explained that refusal to vacate the underlying awards was contrary to South Carolina law and would have significant ramifications on Green Tree. Specifically, Green Tree noted that when the trial courts in these proceedings confirmed the original arbitration awards, post-judgment interest on those awards began to run. Green Tree obtained review of the South Carolina Supreme Court's decision affirming the arbitral awards, and secured an order from this Court vacating the South Carolina Supreme Court's judgment. Despite Green Tree's success on appeal, the refusal to vacate the judgments confirming the arbitration awards would result in post-judgment interest in excess of $8 million from the dates of those judgments to the date of the Conseco bankruptcy. Simply put, Green Tree explained that it should not be required to pay post-judgment interest on judgments that it successfully challenged and which this Court ruled must be vacated.

On February 20, 2004, the South Carolina Supreme Court issued the decision at issue here. Pet. App. 1a-4a. After noting that Justice Breyer's opinion for this Court was "a plurality," the South Carolina Supreme Court acknowledged that the United States Supreme Court had "vacated this Court's decision and remanded the case for the arbitrator to decide whether there could be class arbitration." *Id.* at 2a. Despite that acknowledgment, the Court questioned whether Green Tree actually had won its case before the United States Supreme Court – "Green Tree now claims that they [sic] prevailed in the USSC" – and erroneously suggested that

Green Tree argued that "the case should essentially start over from the beginning." *Id.* at 3a.

Without addressing Green Tree's showing that this Court's decision required vacatur of the judgments confirming the arbitral awards, the South Carolina Supreme Court ruled that "Green Tree's motion to vacate and remit is hereby denied and the matter is remanded to arbitrator Thomas Ervin to determine whether class arbitration was permissible under the parties' contract." Pet. App. 3a. Notwithstanding the settled procedures that apply to an agreement governed by the FAA after an arbitrator issues an arbitral award, see 9 U.S.C. §§ 9-10, the South Carolina Supreme Court, without providing any support, ruled that the arbitrator would "send those findings directly to this Court for further proceedings not inconsistent with the USSC's opinion." Pet. App. 3a-4a.

On the same day, plaintiffs faxed to Green Tree and the arbitrator another proposed order in which they argued, despite the decision of this Court, that there was "no need for an additional hearing in order to render the decision required by the United States Supreme Court." Facsimile from Bradford P. Simpson, to C. Mitchell Brown 2 (Feb. 20, 2004). Plaintiffs' proposed order reiterated the arguments that they made to this Court – and which this Court found unpersuasive – on the issue whether the arbitrator, in fact, independently had determined that Green Tree's arbitration agreement did not prohibit class-wide arbitration.

On February 26, 2004, Green Tree sought a temporary stay from the Supreme Court of South Carolina to allow it to seek a writ of mandamus from this Court. On February 27, 2004, the parties participated in a telephonic conference with the arbitrator. At the outset of that conference, Green Tree informed the arbitrator of its recently-filed motion to stay, and of its intent to file this mandamus petition. Green Tree asked the arbitrator to defer all proceedings until this Court and the South Carolina Supreme Court had acted on Green Tree's requests for relief. The arbitrator declined to do so.

Within one hour of the telephonic conference, the arbitrator once again adopted plaintiffs' position that that there was "no need for an additional hearing in order to render the decision required by the United States Supreme Court." *Bazzle* v. *Green Tree Fin. Corp.*, slip op. at 1 (S.C. Feb. 27, 2004) (Supplemental Order in Arbitration), Pet. App. 20a-21a. Reiterating the views expressed in the August 12, 2003 order that had been voided by the Bankruptcy Court, the arbitrator adopted plaintiffs' proposed order which purportedly "clarifies and reaffirms my previous independent decisions in these consolidated cases that Green Tree's arbitration clause did not forbid class arbitration." *Id.* at 2, Pet. App. 21a. After discussing the arbitration proceedings in the *Lackey* and *Bazzle* cases, the arbitrator adopted plaintiffs' view that his "orders in these consolidated arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts." *Id.* at 3, Pet. App. 22a. Finally, in an effort to give his new order retroactive effect – and thereby render this Court's decision a nullity – the arbitrator adopted plaintiffs' proposal that his new order "merely explains and reaffirms the basis of my earlier orders in these consolidated cases" and "shall be entered *nunc pro tunc*." *Id.*

Immediately thereafter, the arbitrator sent this Supplemental Order in Arbitration to the South Carolina Supreme Court. See Letter from Thomas J. Ervin, Arbitrator, to Daniel E. Shearhouse, Clerk of Court, South Carolina Supreme Court (Feb. 27, 2004). The Supreme Court of South Carolina has not yet ruled on Green Tree's pending request for a temporary stay.

REASONS FOR GRANTING THE PETITION

The Court has long recognized that mandamus relief is appropriate and imperative where a lower court "does not proceed to execute the mandate, or disobeys or mistakes its meaning." *United States* v. *Fossatt*, 62 U.S. (21 How.) 445, 446 (1858). In this case, the South Carolina Supreme Court

has refused to vacate the arbitral awards that this Court has ruled were entered in violation of the Federal Arbitration Act and that therefore must be vacated. Compare Pet. App. 6a (*Green Tree Fin. Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402, 2405 (2003) ("[W]e vacate the judgment of the South Carolina Supreme Court. . . .")), with Pet. App. 3a ("Green Tree's motion to vacate and remit is hereby denied"). In so doing, the court below failed to give effect to this Court's core holding that the original class-wide arbitral awards cannot be reconciled with the requirements of the FAA because, on the "underlying question – whether the arbitration contracts forbid class arbitration – the parties have not yet obtained the arbitration decision that their contracts foresee." Pet. App. 11a. As a result, the court below has failed to give effect to this Court's mandate by refusing to vacate arbitral awards that this Court ruled were entered in violation of the terms of Green Tree's arbitration agreements.

The lower court's failure to enforce the mandate has significant adverse effects on Green Tree's rights under the FAA. As a result of the lower court's actions, Green Tree remains subject to multi-million dollar judgments that are predicated on arbitral awards that this Court ruled were entered in violation of the FAA. What is more, despite the parties' agreements that their arbitrations would be governed by the FAA, the Supreme Court of South Carolina now has adopted entirely unprecedented procedures to govern proceedings *after* the arbitrator has conducted the proceedings that this Court ruled must be implemented on remand.

The parties' agreement, however, makes clear that arbitration shall be governed by the FAA, and Sections 9 and 10 of the FAA set forth the procedures that must be followed after an arbitrator's decision. Those procedures simply cannot be reconciled with a decision of a court to keep in effect judgments that confirm arbitration awards that have been found by the this Court to violate the core requirements of the FAA. As a result, Green Tree may be held liable for

more than $8 million in post-judgment interest relating to the original arbitral awards, even though Green Tree prevailed before this Court in securing a ruling that those awards be vacated.

Absent intervention by this Court, this Court's decision and mandate will be rendered utterly meaningless.

I. ISSUANCE OF A WRIT OF MANDAMUS IS NECESSARY TO ENSURE COMPLIANCE WITH THIS COURT'S MANDATE.

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court "may issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." *Id.* As implemented by this Court's rules, "[t]o justify the granting of any such writ, [a] petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. This is such a case.

As noted above, the Court has long recognized that mandamus is the appropriate remedy for a party who has prevailed before it where the lower court in turn "does not proceed to execute the mandate, or disobeys or mistakes its meaning." *United States* v. *Fossatt*, 62 U.S. (21 How.) 445, 446 (1858). This Court's authority to issue mandamus relief applies not only to lower federal courts, but likewise to those state courts that have disobeyed or failed to give proper effect to a prior judgment or mandate of this Court. See *General Atomic Co.* v. *Felter*, 436 U.S. 493, 497-98 (1978) (per curiam); *Bucolo* v. *Adkins*, 424 U.S. 641, 643-44 (1976) (per curiam); *Deen* v. *Hickman*, 358 U.S. 57, 58 (1958) (per curiam).

Accordingly, where the integrity of this Court's decisions has been undermined by a lower court, this Court has intervened to enforce its mandates. For example, in *Deen* v.

Gulf, Colorado & Santa Fe Ry., 353 U.S. 925 (1957) (per curiam), this Court reversed a state court's judgment overturning a jury's verdict in favor of a plaintiff suing his employer pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* Following the decision, the state's highest court directed that the trial court review the case "'wholly apart from the judgment of the Supreme Court of the United States,'" and consider anew whether the jury's verdict could not stand. See *Deen* v. *Hickman*, 358 U.S. at 57-58. Noting that "[t]he determination of that issue was foreclosed" by the Court's prior decision, this Court set forth its expectation that the state court would "conform" its decision to the previously-issued mandate. *Id.* at 58; see also *Bucolo* v. *Adkins*, 424 U.S. at 643-44 (criticizing state court for failure to respect the Court's ruling in favor of petitioners and calling upon state court to conform to the previously-issued mandate).

This Court's decision in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam), is particularly instructive. In that case, this Court had held that the state court could not interfere with petitioner GAC's attempts to maintain in parallel federal proceedings its asserted right to arbitration. See *General Atomic Co.* v. *Felter*, 434 U.S. 12, 18-19 (1977) (per curiam). On remand, the state court nonetheless issued an order determining that GAC had no right to arbitration and ordering that the arbitration proceedings be stayed. See 436 U.S. at 494. After recognizing that "the [state] court has again done precisely what we held that it lacked the power to do," *id.* at 496, this Court made clear its expectation "that the [state] court will now conform to our previous judgment," *id.* at 497.

In reviewing the matter, this Court noted the long-accepted principle that where a lower court "'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled . . . by a writ of mandamus to execute the mandate of this Court.'" *Id.* at 497

(omission in original) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). The Court continued:

> A litigant who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court.

Id.

As shown below, this case is indistinguishable from *General Atomic*. There, "the [state] court has again done precisely what [this Court] held that it lacked the power to do." *Id.* at 496. Here, the South Carolina Supreme Court has refused to do precisely what this Court's decision requires. That is, the court below has refused to vacate arbitration awards that are, under this Court's prior decision, predicated upon a violation of the FAA. As in *General Atomic*, Green Tree obtained a favorable judgment from this Court after a lengthy appellate process; it "should not be required to go through that entire process again to obtain execution" of this Court's judgment. *Id.* at 497. Action by this Court is necessary to ensure the integrity of its decision-making process by requiring that its mandate be followed.

II. A WRIT OF MANDAMUS SHOULD ISSUE BECAUSE THE SOUTH CAROLINA SUPREME COURT HAS FAILED TO ENFORCE THE CORE MANDATE OF THIS COURT.

A. This Court Vacated The Supreme Court of South Carolina's Decision Affirming The Underlying Arbitration Awards.

In *Green Tree Financial Corp.* v. *Bazzle*, __ U.S. __, 123 S. Ct. 2402 (2003), this Court held that the decision of the Supreme Court of South Carolina affirming the two underlying arbitration awards must be vacated. Pet. App. 6a

("[W]e vacate the judgment of the South Carolina Supreme Court. . . ."); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 363 (S.C. 2002) ("For the foregoing reasons, we AFFIRM the arbitrator's awards in both cases."). The arbitration awards, this Court concluded, could not stand in light of the fact that Green Tree never received, as was its right under the FAA, a determination by a neutral arbitrator on the question whether the parties' contracts permitted class arbitration in the first instance. Pet. App. 6a (vacating and "remand[ing] the case that th[e] question [of contract interpretation] may be resolved in arbitration").

The Court's decision followed from the fact that the parties had agreed to submit to the arbitrator all disputes regarding the kind of arbitration proceeding to which the parties agreed, and that the FAA requires that this agreement be enforced in accordance with its terms. As this Court explained, "[u]nder the terms of the parties' contracts, the question – whether the agreement forbids class arbitration – is for the arbitrator to decide." Pet. App. 10a. As to that issue, however, "the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.* at 11a. As a result, this Court held that it was necessary to vacate the South Carolina Supreme Court's judgment affirming the arbitral awards, *id.*, and, in turn, to order that these disputes be remanded to the arbitrator so that he may rule on the important antecedent question whether class arbitration is permitted by the parties' contracts. *Id.* at 12a.

It is beyond dispute that where this Court "vacate[s] the judgment below," it "eliminates a judgment." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). The prior judgment of the South Carolina Supreme Court affirmed the arbitral awards because it concluded that the arbitration proceeding did not violate the FAA. This Court, however, reached the contrary conclusion, holding that the arbitral awards were entered in violation of the FAA and requiring an arbitrator to decide the question of contract interpretation.

Pet. App. 12a. By refusing to vacate the judgments that affirm the underlying arbitral awards, the South Carolina Supreme Court has rendered this Court's decision a nullity and, as a result, has kept in effect arbitral awards that unquestionably are contrary to the FAA.

B. The Court Below Has Refused To Vacate Its Prior Decision And The Underlying Arbitration Awards Despite This Court's Clear Mandate That It Do So.

Following this Court's decision last Term instructing that "[t]he judgment of the South Carolina Supreme Court is vacated," Pet. App. 12a, Green Tree requested that the South Carolina Supreme Court enforce this Court's mandate by vacating the invalid arbitration awards at issue in this case. The Supreme Court of South Carolina, did not do so, and instead ruled that "*Green Tree's motion to vacate and remit is hereby denied*," thereby leaving the underlying arbitral awards and judgments intact and affirmed. *Id.* at 3a (emphasis added).

The decision of the court below is predicated on two apparent misconceptions. First, it appears that the court below believed that Green Tree did not prevail before this Court. See Pet. App. 3a ("Green Tree now claims that they prevailed in the USSC. . . ."). This Court, however, granted Green Tree relief through vacatur of the state court judgment affirming the arbitral awards. *Id.* at 12a.

Second, the decision below is based on the misconception that Green Tree's motion requested that the arbitration proceedings begin entirely anew. See Pet. App. 3a. Green Tree made no such request. Green Tree only sought the relief granted to it by this Court; that is, that the judgments affirming the underlying arbitral awards be vacated because those arbitral awards were predicated upon an arbitral proceeding that this Court ruled was inconsistent with the Federal Arbitration Act ("FAA").

This Court's decision provided that Green Tree was entitled to an independent determination of this issue by a neutral arbitrator, and therefore the underlying arbitral awards – which were predicated upon a court determination of the class arbitration question – violated the FAA. Put another way, the existing arbitral awards, and the judgment of the South Carolina Supreme Court affirming them, denied Green Tree its rights under the parties' contracts and in so doing violated the FAA. The decision of the Supreme Court of South Carolina refusing to vacate the underlying arbitral awards fails to enforce the very core of this Court's mandate.

In short, the Supreme Court of South Carolina, *in violation of this Court's mandate*, has refused to vacate its prior ruling affirming the underlying arbitration awards. As a result, those awards, which are predicated on the legal infirmity found by this Court, remain intact. Because no other court stands available to enforce this Court's mandate, Green Tree is forced to seek mandamus relief in this Court. See *Kerr* v. *United States Dist. Ct.*, 426 U.S. 394, 402-03 (1976) (mandamus relief appropriate where there exist "no other adequate means to attain the relief" sought).

C. The Lower Court's Failure To Enforce This Court's Mandate Denies Green Tree The Benefit Of This Court's Ruling And The Arbitration That It Bargained For Under the FAA.

Under the Federal Arbitration Act, courts play a limited role; "[a]rbitration is, above all, a matter of contract and courts must respect the parties' bargained-for method of dispute resolution." *John Hancock Mut. Life Ins.* Co. v. *Olick*, 151 F.3d 132, 136-37 (3d Cir. 1998). As this Court held, the parties' contracts provided for a determination by the arbitrator in the first instance whether the agreements allowed for class arbitration. Because Green Tree had not yet been afforded that opportunity, the underlying class-wide arbitral awards were invalid because they ordered class-wide relief without any predicate determination by a neutral

arbitrator that class-wide arbitration is permitted under the parties' agreements.

The Supreme Court of South Carolina has nonetheless refused to vacate the original arbitral awards and judgments, notwithstanding this Court's holding that they cannot be reconciled with the FAA. That ruling not only violates this Court's mandate, but also independently violates the FAA, which makes clear that a judgment confirming an arbitral award can occur only "after" a valid arbitral award has been entered. See 9 U.S.C. § 9. To be sure, this Court recognized that further proceedings before the arbitrator were necessary, and that those proceedings might result in new arbitral awards that potentially could be reconciled with the requirements of the FAA. What is clear, however, is that the pre-existing awards must be vacated because they were contrary to the FAA.

The lower court's refusal to enforce this mandate by failing to vacate the original arbitral awards has dire, real-world consequences for Green Tree. Because the lower court's decision leaves the previously affirmed arbitral awards intact, Green Tree may be liable for more than $8 million in post-judgment interest relating to the original arbitral awards that this Court concluded should be vacated. Absent intervention by this Court, Green Tree's rights – and for that matter its prior victory in this Court – will be rendered meaningless.

Further, the Court below ruled that, after the arbitrator makes findings, he will "send those findings directly to this Court for further proceedings." Pet. App. 3a. Unsurprisingly, the arbitrator has again adopted plaintiffs' position and issued its order "*nunc pro tunc*" as part of an improper effort to circumvent the effect of this Court's decision. Under the FAA, an arbitral award can be confirmed or vacated only *after* it has been issued. 9 U.S.C. § 9 (setting forth process to confirm "after the award is made"); *id.* § 10(a)(3)-(4) (arbitral award may be vacated where arbitrator "refus[ed] to hear evidence" or "exceeded [his] powers"). An arbitrator acts

well outside his authority in issuing retroactive orders that have the effect of turning the required process for confirming and vacating orders inside-out. *Id.* § 10(a)(4). Compliance with such procedures is all the more important here because the arbitrator flatly refused to hold further proceedings regarding the parties' contractual intent and instead rubber-stamped plaintiffs' latest proposed *nunc pro tunc* order, even though this Court made plain that further proceedings before the arbitrator were necessary to resolve "the question of contract interpretation." Pet. App. 6a, 12a.

Moreover, the arbitrator has sent his findings directly to the Supreme Court of South Carolina. The parties' agreement, however, is governed by the FAA, which sets forth the appropriate procedures for confirming or vacating an arbitral award and thereby converting an unenforceable award into an enforceable judgment. See 9 U.S.C. §§ 9, 10.[3] Under Section 10 of the FAA, Green Tree has a right to seek to vacate any subsequent arbitral award in a trial court of competent jurisdiction on the bases provided therein.

As noted above, the arbitrator has refused to conduct "further proceedings" as required by this Court, and has attempted to rewrite history by stating both in the August 12, 2003 Order ruled to be void by the Bankruptcy Court and now again in his February 27, 2004 Order that he conducted class-wide arbitration "based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina contract law." Pet. App. 22a. Of course, that statement cannot be reconciled, for example, with this Court's and the South Carolina Supreme Court's determination that "[a]s far as concerns the *Bazzle* plaintiffs,"

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[3] The South Carolina Supreme Court previously recognized that the parties' agreement was governed by the FAA, and that challenges to arbitral awards were therefore addressed under Section 10 of the FAA. *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 (S.C. 2002).

the "'trial court' issued 'an order granting class certification.'" *Id.* at 11a.

Further, this Court's decision required further proceedings before a neutral arbitrator to allow the parties to obtain a decision "whether the arbitration contracts forbid class arbitration." Pet. App. 11a. As noted, that ruling also is important because Section 10 of the FAA authorizes Green Tree to challenge any arbitral award issued by an arbitrator who has "refus[ed] to hear evidence pertinent and material to the controversy" or where there was "evident partiality or corruption in the arbitrator[]," or where the arbitrator adopted a "*nunc pro tunc*" order that plainly "exceeded his powers." 9 U.S.C. § 10(a)(2)-(4). The South Carolina Supreme Court's decision deprives Green Tree of the right to present such matters in the trial court as a basis for vacating any arbitral award that should result after remand to the arbitrator. Cf. *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring) ("a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will") .

* * * *

Petitioner respectfully submits that the South Carolina Supreme Court's failure to enforce this Court's mandate renders this a case in which issuance of the writ by this Court is not only appropriate, but imperative to guarantee the rights of a party who has prevailed before this Court and to ensure that this Court's decisions are fully enforced by the lower courts.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

LYNN W. BAZZLE AND BURT A. BAZZLE, in a representative capacity on behalf of a class and for all others similarly situated,

Respondents,

v.

GREEN TREE FINANCIAL CORPORATION A/K/A GREEN TREE ACCEPTANCE CORPORATION A/K/A GREEN TREE FINANCIAL SERVICES CORPORATION N/K/A CONSECO FINANCE, INC.,

Appellant.

DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, in a representative capacity on behalf of a class and for all other similarly situated,

Respondents,

v.

GREEN TREE FINANCIAL CORPORATION N/K/A CONSECO FINANCIAL, INC.,

Appellant.

ORDER

Respondents Bazzle and Lackey filed separate class action claims in the circuit court claiming they were entitled to damages against appellant Green Tree because Green Tree did not provide required documents at the time of

respondents' loan transactions. The contracts entered into between respondents and Green Tree provided for arbitration of all claims. However, the contracts were silent as to whether there could be class-wide arbitration.

The circuit court decided in Bazzle case that class-wide arbitration was permissible and then sent the case to the arbitrator. The arbitrator in the Lackey case took his cue from the circuit court and also decided that there could be class-wide arbitration. The arbitrator awarded damages and attorney's fees. Green Tree appealed both cases to the Court of Appeals, claiming that class arbitration was legally impermissible. This Court assumed jurisdiction over the appeals and consolidated them. This Court held, among other things, that since the contract was silent as to class arbitration, it was permissible. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002).

Green Tree appealed to the United States Supreme Court (USSC). The USSC granted certiorari and, in a plurality opinion, held that it was for the arbitrator, not the courts, to decide whether class arbitration was permissible. *Bazzle v. Green Tree Financial Corp.*, __ U.S. __, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). Thus, the USSC vacated this Court's decision and remanded the case for the arbitrator to decide whether there could be class arbitration.

On June 23, 2003, the USSC issued an order stating "it is ordered and adjudged by this Court that the judgment of the [Supreme Court of South Carolina] is vacated with costs, and the case is remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with the opinion of this Court." On August 6, 2003, Deputy Clerk of Court Brenda Shealy issued a letter returning the proceedings to the arbitrator in the matter. Arbitrator Thomas Ervin then issued an order *nunc pro tunc* stating that he applied South Carolina contract law in determining that the contracts, although silent as to whether there could be class arbitration, allowed for class arbitration. Ervin further stated that the order was

issued for clarification only, and that his interpretation was based "solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina contract law."

Green Tree had filed for bankruptcy in December 2002. On September 15, 2003, the bankruptcy court found the actions of this Court in sending the letter to the arbitrator, and the arbitrator's subsequent order, to be null and void because they violated the automatic stay. That injunction was lifted on December 18, 2003, giving this Court permission to fulfill the mandate of the USSC.

Green Tree now claims that they prevailed in the USSC, and that the case should essentially start over from the beginning. Green Tree argues that since the USSC vacated this Court's opinion, then the judgments entered in the circuit court should be vacated as well. Respondents argue that the USSC's opinion merely vacated this Court's opinion so that the arbitrator, not a court, could decide whether there could be class arbitration. Respondents ask this Court to simply do what it did before, which was to send the matter back to the arbitrator to determine whether class arbitration is allowed.

Respondents have also filed a motion to strike from Green Tree's Motion to Vacate and Remit a portion which quotes the bankruptcy judge's disapproval of this Court's August 6, 2003 letter and of the subsequent order from Ervin. Respondents contend that it was inappropriate for Green Tree to include quotes from the bankruptcy judge because the judge later stated that she did not want the parties to use any "off-the-cuff" remarks by her in a later state proceeding.

Green Tree's motion to vacate and remit is hereby denied and the matter is remanded to arbitrator Thomas Ervin to determine whether class arbitration was permissible under the parties' contract. Thereafter, Ervin will send those findings directly to this Court for further proceedings not inconsistent

with the USSC's opinion. Further, respondents' motion to strike is hereby denied.

IT IS SO ORDERED.

/s/ JEAN H. TOEL C.J.

/s/ JAMES E. MOORE J.

/s/ JOHN H. WALLER, JR. J.

Burnett, J., and Pleicones, J., not participating.

Columbia, South Carolina
February 20, 2004

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 02-634.

GRENN TREE FINANCIAL CORP., NKA CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE, et al., in a representative capacity on behalf of a class and for all others similarly situated, et al.,

Respondents.

Argued April 22, 2003.
Decided June 23, 2003.

Certiorari to the Supreme Court of South Carolina.

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE GINSBURG join.

This case concerns contracts between a commercial lender and its customers, each of which contains a clause providing for arbitration of all contract-related disputes. The Supreme Court of South Carolina held (1) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitration, and (2) that, in that circumstance, South Carolina law interprets the contracts as permitting class arbitration. 351 S.C. 244, 569 S.E.2d 349 (2002). We granted certiorari to determine whether this holding is consistent with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? Given the South Carolina Supreme Court's holding, it is important to resolve that question. But we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide. Because the record suggests that the parties have not yet received an arbitrator's decision on that question of contract interpretation, we vacate the judgment of the South Carolina Supreme Court and remand the case so that this question may be resolved in arbitration.

I

In 1995, respondents Lynn and Burt Bazzle secured a home improvement loan from petitioner Green Tree. The Bazzles and Green Tree entered into a contract, governed by South Carolina law, which included the following arbitration clause:

> "ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1.... THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY U.S. (AS PROVIDED HEREIN) .... The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." App. 34 (emphasis added, capitalization in original).

Respondents Daniel Lackey and George and Florine Buggs entered into loan contracts and security agreements for the purchase of mobile homes with Green Tree. These agreements contained arbitration clauses that were, in all relevant respects, identical to the Bazzles' arbitration clause. (Their contracts substitute the word "you" with the word "Buyer[s]" in the italicized phrase.) 351 S.C., at 264, n. 18, 569 S.E.2d, at 359, n. 18 (emphasis deleted).

At the time of the loan transactions, Green Tree apparently failed to provide these customers with a legally required form that would have told them that they had a right to name their own lawyers and insurance agents and would have provided space for them to write in those names. See S.C.Code Ann. § 37-10-102 (West 2002). The two sets of customers before us now as respondents each filed separate actions in South Carolina state courts, complaining that this failure violated South Carolina law and seeking damages.

In April 1997, the Bazzles asked the court to certify their claims as a class action. Green Tree sought to stay the court proceedings and compel arbitration. On January 5, 1998, the court both (1) certified a class action and (2) entered an order compelling arbitration. App. 7. Green Tree then selected an arbitrator with the Bazzles' consent. And the arbitrator, administering the proceeding as a class arbitration, eventually awarded the class $10,935,000 in statutory damages, along with attorney's fees. The trial court confirmed the award, App. to Pet. for Cert. 27a-35a, and Green Tree appealed to the South Carolina Court of Appeals claiming, among other things, that class arbitration was legally impermissible.

Lackey and the Buggses had earlier begun a similar court proceeding in which they, too, sought class certification. Green Tree moved to compel arbitration. The trial court initially denied the motion, finding the arbitration agreement unenforceable, but Green Tree pursued an interlocutory appeal and the State Court of Appeals reversed. *Lackey* v. *Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898

(1998). The parties then chose an arbitrator, indeed the same arbitrator who was subsequently selected to arbitrate the Bazzles' dispute.

In December 1998, the arbitrator certified a class in arbitration. App. 18. The arbitrator proceeded to hear the matter, ultimately ruled in favor of the class, and awarded the class $9,200,000 in statutory damages in addition to attorney's fees. The trial court confirmed the award. App. to Pet. for Cert. 36a-54a. Green Tree appealed to the South Carolina Court of Appeals claiming, among other things, that class arbitration was legally impermissible.

The South Carolina Supreme Court withdrew both cases from the Court of Appeals, assumed jurisdiction, and consolidated the proceedings. 351 S.C., at 249, 569 S.E.2d, at 351. That court then held that the contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. We granted certiorari to consider whether that holding is consistent with the Federal Arbitration Act.

II

The South Carolina Supreme Court's determination that the contracts are silent in respect to class arbitration raises a preliminary question. Green Tree argued there, as it argues here, that the contracts are not silent—that they forbid class arbitration. And we must deal with that argument at the outset, for if it is right, then the South Carolina court's holding is flawed on its own terms; that court neither said nor implied that it would have authorized class arbitration had the parties' arbitration agreement forbidden it.

Whether Green Tree is right about the contracts themselves presents a disputed issue of contract interpretation. THE CHIEF JUSTICE believes that Green Tree is right; indeed, that Green Tree is so clearly right that we should ignore the fact that state law, not federal law, normally governs such matters, see *post*, at 1 (STEVENS, J., concurring in judgment and dissenting in

part), and reverse the South Carolina Supreme Court outright, see *post,* at 4-6 (REHNQUIST, C.J., dissenting). THE CHIEF JUSTICE points out that the contracts say that disputes "shall be resolved ... by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]." App. to Pet. for Cert. 110a. See *post,* at 4-5. And it finds that class arbitration is clearly inconsistent with this requirement. After all, class arbitration involves an arbitration, not simply between Green Tree and a *named customer,* but also between Green Tree and *other* (represented) customers, all taking place before the arbitrator chosen to arbitrate the initial, *named customer's* dispute.

We do not believe, however, that the contracts' language is as clear as THE CHIEF JUSTICE believes. The class arbitrator *was* "selected by" Green Tree "with consent of" Green Tree's customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well.

Of course, Green Tree did *not* independently select *this* arbitrator to arbitrate its disputes with the *other* class members. But whether the contracts contain this additional requirement is a question that the literal terms of the contracts do not decide. The contracts simply say (I) "selected by us [Green Tree]." And that is literally what occurred. The contracts do not say (II) "selected by us [Green Tree] to arbitrate this dispute and no other (even identical) dispute with another customer." The question whether (I) in fact implicitly means (II) is the question at issue: Do the contracts forbid class arbitration? Given the broad authority the contracts elsewhere bestow upon the arbitrator, see, *e.g.,* App. to Pet. for Cert. 110a (the contracts grant to the arbitrator "all powers," including certain equitable powers "provided by the law and the contract"), the answer to this question is not completely obvious.

At the same time, we cannot automatically accept the South Carolina Supreme Court's resolution of this contract-

interpretation question. Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide. The parties agreed to submit to the arbitrator "*[a]ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." *Ibid.* (emphasis added). And the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute "relating to this contract" and the resulting "relationships." Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (arbitration is a "matter of contract"). And if there is doubt about that matter—about the "'scope of arbitrable issues'"—we should resolve that doubt "'in favor of arbitration.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986). These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. See generally *Howsam*, *supra*. See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-547 (1964) (whether an arbitration agreement survives a corporate merger); *AT&T*, *supra*, at 651-652 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).

The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It

concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. 514 U.S., at 942-945. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures, cf. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-476 (1989). It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide. Cf. *Howsam*, *supra*, at 83 (finding for roughly similar reasons that the arbitrator should determine a certain procedural "gateway matter").

III

With respect to this underlying question—whether the arbitration contracts forbid class arbitration—the parties have not yet obtained the arbitration decision that their contracts foresee. As far as concerns the *Bazzle* plaintiffs, the South Carolina Supreme Court wrote that the "trial court" issued "an order granting class certification" and the arbitrator subsequently "administered" class arbitration proceedings "without further involvement of the trial court." 351 S.C., at 250-251, 569 S.E.2d, at 352. Green Tree adds that "the class arbitration was imposed on the parties and the arbitrator by the South Carolina trial court." Brief for Petitioner 30. Respondents now deny that this was so, Brief for Respondents 13, but we can find no convincing record support for that denial.

As far as concerns the *Lackey* plaintiffs, what happened in arbitration is less clear. On the one hand, the *Lackey* arbitrator (the same individual who later arbitrated the *Bazzle* dispute)

wrote: "*I* determined that a class action should proceed in arbitration based upon *my* careful review of the broadly drafted arbitration clause prepared by Green Tree." App. to Pet. for Cert. 84a (emphasis added). And respondents suggested at oral argument that the arbitrator's decision was independently made. Tr. of Oral Arg. 39.

On the other hand, the *Lackey* arbitrator decided this question after the South Carolina trial court had determined that the identical contract in the *Bazzle* case authorized class arbitration procedures. And there is no question that the arbitrator was aware of the *Bazzle* decision, since the *Lackey* plaintiffs had argued to the arbitrator that it should impose class arbitration procedures in part because the state trial court in *Bazzle* had done so. Record on Appeal 516-518. In the court proceedings below (where Green Tree took the opposite position), the *Lackey* plaintiffs maintained that "to the extent" the arbitrator decided that the contracts permitted class procedures (in the *Lackey* case or the *Bazzle* case), "it was a reaffirmation and/or adoption of [the *Bazzle* c]ourt's prior determination." Record on Appeal 1708, n. 2. See also App. 31-32, n. 2.

On balance, there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation. That being so, we remand the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms. 9 U.S.C. § 2; *Volt*, *supra*, at 478-479.

The judgment of the South Carolina Supreme Court is vacated, and the case is remanded for further proceedings.

So ordered.

JUSTICE STEVENS, concurring in the judgment and dissenting in part.

The parties agreed that South Carolina law would govern their arbitration agreement. The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. 351 S.C. 244, 262-266, 569 S.E.2d 349, 359-360 (2002). There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina. See *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476 (1989).

Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court. See *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). Because the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker, there is no need to remand the case to correct that possible error.

Accordingly, I would simply affirm the judgment of the Supreme Court of South Carolina. Were I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because JUSTICE BREYER's opinion expresses a view of the case close to my own, I concur in the judgment. See *Screws* v. *United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, dissenting.

The parties entered into a contract with an arbitration clause that is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The Supreme Court of South Carolina held that arbitration under the contract could proceed as a class action even though the contract does not by its terms permit class-action arbitration. The plurality now vacates that judgment and remands the case for the arbitrator to make this determination. I would reverse because this determination is one for the courts, not for the arbitrator, and the holding of the Supreme Court of South Carolina contravenes the terms of the contract and is therefore pre-empted by the FAA.

The agreement to arbitrate involved here, like many such agreements, is terse. Its operative language is contained in one sentence:

> "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." App. 34.

The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts. See *Major League Baseball Players Assn.* v. *Garvey*, 532 U.S. 504, 509-510 (2001) *(per curiam)*. The Supreme Court of South Carolina relied on this principle in deciding that the arbitrator in this case did not abuse his discretion in allowing a class action. 351 S.C. 244, 266-268, 569 S.E.2d 349, 361-362 (2002). But the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator. As we stated in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995):

> "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator would decide."

Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted. Those are the two provisions in the sentence quoted above, and it is difficult to say that one is more important than the other. I have no hesitation in saying that the choice of arbitrator is as important a component of the agreement to arbitrate as is the choice of what is to be submitted to him.

Thus, this case is controlled by *First Options*, and not by our more recent decision in *Howsam* v. *Dean Witter Reynolds*, Inc., 537 U.S. 79 (2002). There, the agreement provided that any dispute "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." *Id.*, at 81 (internal quotation marks omitted). Howsam chose the National Association of Securities Dealers (NASD), and agreed to that organization's "Uniform Submission Agreement" which provided that the arbitration would be governed by NASD's "Code of Arbitration Procedure." *Id.*, at 82. That code, in turn, contained a limitation. This Court held that it was for the arbitrator to interpret that limitation provision:

> "'"[P]rocedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide. *John Wiley* [*& Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)] (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are

> prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.*, at 84.

I think that the parties' agreement as to how the arbitrator should be selected is much more akin to the agreement as to what shall be arbitrated, a question for the courts under *First Options*, than it is to "allegations of waiver, delay, or like defenses to arbitrability," which are questions for the arbitrator under *Howsam*.

"States may regulate contracts, including arbitration clauses, under general contract law principles," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995). "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). But "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 477 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

The parties do not dispute that this contract falls within the coverage of the FAA. 351 S.C., at 257, 569 S.E.2d, at 355. The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, *supra*, at 479 (internal quotation marks omitted)). See also *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options*, *supra*, at 947. In other words, Congress sought simply to "place such agreements upon the same footing as other contracts." *Volt*, *supra*, at 474 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted)). This aim "requires that we rigorously enforce agreements to arbitrate," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Dean Witter Reynolds, Inc.*

v. *Byrd*, 470 U.S. 213, 221 (1985) (internal quotation marks omitted)), in order to "give effect to the contractual rights and expectations of the parties," *Volt*, *supra*, at 479. See also *Mitsubishi Motors*, *supra*, at 626 ("[A]s with any other contract, the parties' intentions control").

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, *supra*, at 479. Here, the parties saw fit to agree that any disputes arising out of the contracts "shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." App. 34. Each contract expressly defines "us" as petitioner, and "you" as the respondent or respondents named in that specific contract. *Id.*, at 33 ("'We' and 'us' means the Seller *above*, its successors and assigns"; "'You' and 'your' means each Buyer *above* and guarantor, jointly and severally" (emphasis added)). The contract also specifies that it governs all "disputes ... arising from ... *this* contract or the relationships which result from *this* contract." *Id.*, at 34 (emphasis added). These provisions, which the plurality simply ignores, see *ante*, at 5, make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer.

While the observation of the Supreme Court of South Carolina that the agreement of the parties was silent as to the availability of class-wide arbitration is literally true, the imposition of class-wide arbitration contravenes the just-quoted provision about the selection of an arbitrator. To be sure, the arbitrator that administered the proceedings was "selected by [petitioner] with consent of" the Bazzles, Lackey, and the Buggses. *Id.*, at 34-36. But petitioner had the contractual right to choose an arbitrator for each dispute with the other 3,734 individual class members, and this right was denied when the same arbitrator was foisted upon petitioner to resolve those claims as well. Petitioner may well have chosen different arbitrators for some or all of these other disputes; indeed, it would have been reasonable for petitioner

to do so, in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator. As petitioner correctly concedes, Brief for Petitioner 32, 42, the FAA does not prohibit parties from choosing to proceed on a class-wide basis. Here, however, the parties simply did not so choose.

"Arbitration under the Act is a matter of consent, not coercion." *Volt*, *supra*, at 479. Here, the Supreme Court of South Carolina imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen. It did not enforce the "agreemen[t] to arbitrate ... according to [its] terms." *Mastrobuono*, *supra*, at 54 (internal quotation marks omitted). I would therefore reverse the judgment of the Supreme Court of South Carolina.

JUSTICE THOMAS, dissenting.

I continue to believe that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts. *Allied- Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 285-297 (1995) (THOMAS, J., dissenting). See also *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 689 (1996) (THOMAS, J., dissenting). For that reason, the FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement. Accordingly, I would leave undisturbed the judgment of the Supreme Court of South Carolina.

APPENDIX C

ON REMAND FROM
THE SUPREME COURT OF SOUTH CAROLINA

LYNN W. BAZZLE AND BURT A. BAZZLE in a representative capacity on behalf of a class and for all others similarly situated

vs.

GREEN TREE FINANCIAL CORP., et al.

DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

vs.

GREEN TREE FINANCIAL CORP., et al.

SUPPLEMENTAL ORDER IN ARBITRATION

This matter has been remanded to me by the South Carolina Supreme Court pursuant to an Order dated February 20, 2004, for clarification of my previous decisions in these consolidated cases. At the request of B. Rush Smith III, attorney for Green Tree, a conference call was held with all attorneys of record for the purpose of discussing this matter in a related proceedings. As arbitrator, I advised all attorneys on this conference call that the question of whether the subject arbitration clauses allowed for class arbitration has already been fully briefed and argued by the parties in the proceedings before me. Thus, I find no need for an additional

hearing in order to render the decision required by the United States Supreme Court.

In light of the decision of the South Carolina Supreme Court dated February 20, 2004, and the decision of the United States Supreme Court dated June 23, 2003, this order clarifies and reaffirms my previous independent decisions in these consolidated cases that Green Tree's arbitration clause did not forbid class arbitration and authorized me to arbitrate both cases on a class-wide basis. The United States Supreme Court has determined in this case that, "[u]nder the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide." *Green Tree v. Bazzle*, 123 S.Ct. 2402, 2407. The Supreme Court has remanded the case so that I "may decide the question of contract interpretation." *Green Tree v. Bazzle*, at 2408 (plurality opinion); *see also* opinion of Stevens, J., *concurring in the judgment, Green Tree v. Bazzle*, at 2409.

I initially addressed the question of contract interpretation in the *Lackey* case, and held that Green Tree's arbitration agreement authorized class arbitration. I received briefs from the parties, and held a hearing on August 19, 1998, specifically to determine "whether or not a class action could be arbitrated pursuant to the Arbitration Agreement between the parties." Order dated August 28, 1998. As I explained in my final written award, "I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree." Final Order and Award in Arbitration, July 24, 2000, *quoted in Green Tree v. Bazzle*, at 2408. In reaching my decision, I relied on the terms of the arbitration agreement. I did not consider myself bound by the trial court's earlier class certification order in *Bazzle*. The parties did not argue, nor did I believe, that my determination of the question should be anything other than my own *de novo* decision. I only viewed the earlier *Bazzle* court order as persuasive—not binding—authority that supported my own reading of the contract

language. It was then, and remains now, my independent construction that the agreement must be read to permit class arbitration.

My determination in *Lackey* that the agreement authorized class arbitration applies with equal force in *Bazzle*. Moreover, I was required on several occasions to directly consider the class arbitration issue in the *Bazzle* matter. The first instance was when Green Tree moved to dismiss and decertify the class in *Bazzle*. My denial of that motion implicitly reaffirmed my earlier construction of the arbitration clause. The second instance was when the *Bazzle* Complaint was amended in arbitration at the request of Green Tree. The Amended Complaint asserted class allegations without objection from Green Tree. Green Tree also requested that the *Lackey* home improvement transactions be moved to and consolidated in the *Bazzle* arbitration proceeding. These events necessitated my independent determination that it was appropriate to proceed as a class action in the *Bazzle* matter.

My orders in these consolidated arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina contract law. Because this order merely explains and reaffirms the basis of my earlier orders in these consolidated cases, it shall be entered *nunc pro tunc*.

/s/ Thomas J. Ervin Arbitrator
THOMAS J. ERVIN
ARBITRATOR

February 27, 2004

Filed at 11:45 a.m.

APPENDIX D

FEDERAL STATUTES

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse

party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub.L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub.L. 102-354, § 5(b)(4), 106 Stat. 946; May 7, 2002, Pub.L. 107-169, § 1, 116 Stat. 132.)

(2)

No. 03-1243

Supreme Court, U.S.
FILED
APR 2 - 2004
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IN THE

Supreme Court of the United States

– *IN RE* GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

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BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 03-1243

IN RE GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The petition for a writ of mandamus should be denied because the proceedings in the state courts on remand, though not yet complete, are fully in accord with this Court's mandate, and petitioner has shown no grounds for this extraordinary relief. In its opinion in this case on June 23, 2003, this Court held that the permissibility of class-wide arbitration is a matter of case-by-case, state-law contract interpretation for the arbitrator to decide. Pet. App. 8a-11a. Because four of the six justices in this Court's majority thought that "what happened in arbitration" on that question of contract interpretation was not entirely "clear," the Court remanded for further proceedings. Pet. App. 11a. The plurality acknowledged that the arbitrator might already have independently determined that Green Tree's arbitration clause permitted class arbitration, quoting the arbitrator's own order

in which he said "*I* determined that a class action should proceed in arbitration based on *my* careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 12a. A state trial court had earlier read the clause the same way, however, and this Court had not previously delineated arbitrators' and courts' respective roles in deciding such questions. Accordingly, because the "record suggest[ed]" that "the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's decision," this Court decided to "remand the case so that this question may be resolved in arbitration." Pet. App. 6a, 12a.

In response to this Court's order vacating the judgment of the South Carolina Supreme Court and remanding for further proceedings, the state high court remanded to the arbitrator (a former state court circuit judge), who has now unmistakably confirmed in a written order that he did, in the first instance, independently interpret the contract to permit class arbitration, and that he continues to adhere to that view. *Id.* at 3a, 20a-22a. The procedure and substance of the state courts' and the arbitrator's actions are fully consistent with this Court's mandate. Contrary to petitioner's contentions, this Court did not hold that the arbitration awards violated the FAA. Moreover, FAA §§ 9 and 10 do not apply, and do not require an approach different from that which the state courts and arbitrator have thus far pursued under the mandate.

Respondents won their judgments twenty-seven months before Green Tree filed for bankruptcy protection, and petitioner was required to post bonds to secure them. Petitioner (now a liquidating trust in bankruptcy known as the CFC Estate) long ago exhausted its challenges to the merits of the arbitrator's decision that the company wilfully and egregiously violated the statutory rights of over 3,600 South Carolina consumers. Petitioner is nonetheless waging an aggressive campaign, repeatedly (and thus far unsuccessfully) seeking on procedural grounds in various fora to vacate the

state court judgments, release the bonds, recover the collateral, and convert respondents from secured to unsecured creditors in bankruptcy to minimize their recovery on the judgments. This petition is but the latest effort to achieve vacatur of the state trial court's judgments confirming the arbitration awards, in order that petitioner might then attempt to argue for release of the bonds securing those judgments and eviscerate respondents' recovery. The South Carolina Supreme Court, following full briefing, correctly applied state procedural law to deny petitioner's motion to vacate the underlying judgments. Pet. App. 1a-4a. The current petition invites this Court to second-guess and micro-manage the state courts' procedures for remitting this case to the arbitrator, and should be denied.

Background

Pre-mandate State Court Proceedings. This case originnated as two separate actions against Green Tree Financial Corporation in the South Carolina State Circuit Courts. (*Bazzle v. Green Tree*, C/A No. 97-CP-18-258, and *Lackey v. Green Tree*, C/A No.96-CP-06-073). In 2000, the Bazzle/ Lackey plaintiffs (respondents here) obtained two separate judgments against Green Tree. Each judgment confirmed an award by the same arbitrator, who found that Green Tree had willfully violated the South Carolina Consumer Protection Code.

Green Tree appealed, and the South Carolina Supreme Court assumed immediate jurisdiction. As a condition of obtaining a stay pending appeal, Green Tree in December 2000 and June 2001 obtained state trial courts' approval of supersedeas bonds securing the judgments. On August 26, 2002, the South Carolina Supreme Court affirmed the judgments, ruling that the arbitrator had authority to arbitrate the Bazzle/Lackey actions on a class-wide basis. In early November 2002, each of the trial courts granted Green Tree's

motion to stay enforcement of the judgments, expressly conditioning the stay on Green Tree making timely deposits of post-judgment interest that continued to accrue in the interim. *Bazzle v. Green Tree Fin. Corp.*, No. 00-CP-18-793, slip. op. (Nov. 6, 2002) (order of state circuit court awarding interim interest), Opp. App. 2a; and *Lackey v. Green Tree Fin. Corp.*, 96-CP-06-073, slip op. (Nov. 6, 2002)(order of circuit court awarding interim interest), Opp. App. 5a.

Pre-mandate Bankruptcy Court Proceedings. On December 17, 2002, Conseco Finance, formerly known as Green Tree, filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. The pendency of bankruptcy proceedings automatically stayed all litigation by or against Green Tree. On January 21, 2003, after petitioner had already filed its petition for certiorari in this Court, petitioner obtained an order from the bankruptcy court providing that "the automatic stay is hereby annulled retroactively to the Petition Date for the limited purpose of prosecuting the Supreme Court Action . . . . " *In re Conseco, Inc.*, No. 02 B 49672, slip. op. at 2 (Bankr. N.D. Ill. Jan. 21, 2003) (order lifting automatic stay).

This Court's Decision and the Mandate. This Court granted certiorari on the question "[w]hether the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (FAA), prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." 123 S. Ct. 2402, 2404 (2003). In its June 23, 2003 opinion, this Court rejected petitioner Green Tree's contention that class-wide arbitration under a predispute arbitration clause not expressly authorizing class proceedings violates the FAA, instead holding that the permissibility of class-wide arbitration is a matter of case-by-case, state-law contract interpretation for the arbitrator to decide. Pet. App. 11a-12a (plurality opinion); *id.* at 13a (Stevens, J., concurring

in the judgment); *id.* at 19a (Thomas, J, dissenting in favor of outright affirmance).

This Court recognized that the arbitration clause might correctly be read to permit class arbitration.[1] The opinion also expressly acknowledged the possibility that the arbitrator had already independently read the arbitration clause to authorize him to proceed on a class basis, noting that the arbitrator stated that he based his award on "*my* careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 12a.[2] The Court also saw reason for some uncertainty as to what had occurred. Pet. App. 6a (noting that the "record suggests" that the arbitrator may not yet have made an independent decision), *id.* at 11a (observing that "what happened in arbitration" was not "clear"). Until this Court decided this case, the law was undeveloped as to whether the permissibility of class arbitration is ordinarily a

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[1] Green Tree argued that the clause's reference to resolution of disputes "by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]" foreclosed class arbitration, but this Court observed that "[t]he class arbitrator *was* 'selected by' Green Tree 'with consent of' Green Tree's customers, the named plaintiffs. And insofar as the other class members agreed to proceed in class arbitration, they consented as well." Pet. App. 9a.

[2] Indeed, Green Tree's own original briefs to the South Carolina Supreme Court, in advance of this Court's decision, repeatedly asserted that the *arbitrator* was the one who had interpreted the contract. Green Tree asserted that the arbitrator "*took it upon himself* to determine the propriety of a class-wide arbitration and certify a class" Final Brief of Appellant, at 29, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001), that "the arbitrator, *on his own*, imposed class-wide arbitration and certified a class" Final Brief of Appellant, at 12, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001), and that the arbitrator "decided the class action issue *himself*." Final Brief of Appellant, at 2, *Bazzle v. Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed December 6, 2001) (emphases added).

matter for courts or arbitrators to decide. The Court expressed concern that the arbitrator, who interpreted the clause to permit class arbitration after a state trial court had already read the clause the same way, might not have appreciated that the decision was his to make in the first instance. Pet. App. 12a. Because four of the six justices in the majority thought that "what happened in arbitration" on the contract interpretation question was unclear, the Court remanded for further proceedings to clarify the arbitrators' decision. Pet. App. 9a, 11a.[3]

This Court's mandate directed that "the judgment of the above court in this cause [the Supreme Court of South Carolina] is vacated with costs, and the case is remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with the opinion of this Court." *Green Tree v. Bazzle*, Case No. 02-634 (Aug. 6, 2003) (Mandate of this Court). Neither the mandate nor this Court's opinion makes any reference to or purports to disturb the underlying arbitration awards or trial court judgments confirming those awards.

Post-mandate State Court Proceedings. In response to the United States Supreme Court's mandate, on August 6, 2003, the South Carolina Supreme Court *sua sponte* returned this matter to the arbitrator "for further proceedings not

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[3] Justice Thomas concluded that the FAA simply does not apply to proceedings in state courts, and thus lacks any preemptive force here. Pet. App. 19a (Thomas, J, dissenting). He "would leave undisturbed the judgment of the Supreme Court of South Carolina." *Id.* Justice Stevens also saw no need to remand, "because the decision to conduct a class arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker." *Id.* at 13a (Stevens, J., concurring in the judgment). Justice Stevens "would simply affirm the judgment of the Supreme Court of South Carolina," but concurred in the judgment to remand in order to avoid a decision lacking a controlling judgment. *Id.*

inconsistent with the opinion of that Court."[4] Letter from Clerk of Court, South Carolina Supreme Court, to Thomas Ervin, at 1 (Aug. 6, 2003), Opp. App. 9a. On August 12, 2003, the arbitrator addressed the question of contract interpretation in an order that provides, in relevant part:

> I wish to clarify my prior rulings that the arbitration clause contained in these adhesion contracts written by Green Tree were silent as to class certification in arbitration . . . . I applied South Carolina contract law in construing this broad arbitration clause drafted by Green Tree. I concluded that since the arbitration clause was silent as to class treatment that class certification was appropriate. I reached this decision independently in arbitration without influence from any other court ruling. My orders in these arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina contract law. For clarification only, I issue this Order *nunc pro tunc*, retroactive to my initial Order in Arbitration.

Opp. App. 7a-8a.

On August 13, 2003, the bankruptcy court ruled that its prior Order lifting the stay to permit this Court's review did not allow action on remand pursuant to this Court's mandate. The bankruptcy court thus held that the arbitrator's August 12, 2003, order was void because it violated the automatic stay. Thereafter, the Bazzle/Lackey plaintiffs successfully moved the bankruptcy court to permit them to proceed in state court and before the arbitrator to carry out this Court's remand order.

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[4] On August 8, 2003, Green Tree for the first time notified the South Carolina Supreme Court of its filing for bankruptcy by filing with the court a suggestion of bankruptcy. Green Tree did not file any similar motion before the arbitrator.

On December 18, 2003, petitioner moved the South Carolina Supreme Court to vacate the trial court judgments before permitting the arbitrator to proceed. *See* Pet. App. 3a. Following full briefing on state-law procedures for sending the contract question to the arbitrator, the South Carolina Supreme Court denied Green Tree's motion, and ordered the matter be "remanded to arbitrator Thomas Ervin to determine whether class arbitration was permissible under the parties' contract." Pet. App. 3a.

At petitioner's request, the arbitrator held a conference with the parties on February 27, 2004. At the close of that proceeding, the arbitrator announced his decision and memorialized it in a written Supplemental Order, which, in pertinent part, provides:

> [t]he question of whether the subject arbitration clauses allowed for class arbitration has already been fully briefed and argued by the parties in the proceedings before me. I initially addressed the question of contract interpretation in the *Lackey* case, and held that Green Tree's arbitration agreement authorized class arbitration. I received briefs from the parties, and held a hearing on August 19, 1998, specifically to determine "whether or not a class action could be arbitrated pursuant to the Arbitration Agreement between the parties." Order dated August 29, 1998. As I explained in my final written award, "I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree." Final Order and Award in Arbitration, July 24, 2000, quoted in *Green Tree v. Bazzle*, [__ U.S. __, 123 S. Ct.] at 2408. In reaching my decision, I relied on the terms of the arbitration agreement. I did not consider myself bound by the trial court's earlier class certification order in *Bazzle*. The parties did not argue, nor did I believe, that my determination of the question should be anything other than my own de novo decision. I only viewed the earlier *Bazzle* court order as persuasive

> —not binding—authority that supported my own reading of the contract language. It was then, and remains now, my independent construction that the agreement must be read to permit class arbitration.
>
> My determination in *Lackey* that the agreement authorized class arbitration applies with equal force in *Bazzle*. Moreover, I was required on several occasions to directly consider the class arbitration issue in the *Bazzle* matter. The first instance was when Green Tree moved to dismiss and decertify the class in *Bazzle*. My denial of that motion implicitly reaffirmed my earlier construction of the arbitration clause. The second instance was when the Bazzle Complaint was amended in arbitration at the request of Green Tree. The Amended Complaint asserted class allegations without objecttion from Green Tree. Green Tree also requested that the *Lackey* home improvement transactions be moved to and consolidated in the *Bazzle* arbitration proceedings. These events necessitated my independent determination that it was appropriate to proceed as a class action in the *Bazzle* matter.

Pet. App. 20a-22a. The arbitrator transmitted the Supplemental Order to the South Carolina Supreme Court. On March 1, 2004, petitioner filed its writ of mandamus with this Court.

Post-mandate Bankruptcy Proceedings. Meanwhile, when this case was on remand to the state courts, petitioner on August 13, 2003, initiated an adversary proceeding in the bankruptcy court seeking a declaration that the obligations under the supersedeas bonds had been discharged by this Court's decision. Petitioner had long before sold its interests in the collateral securing the supersedeas bonds.[5] The

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[5] Petitioner acknowledged that "[t]he cash collateralizing the Supersedeas Bonds and on bond with the South Carolina courts has been sold to CFN as part of the CFN Sale Transaction. Thus, to the extent that any such cash is released, it will not become property of Conseco's estates, if

bankruptcy court dismissed the adversary action, abstaining in favor of a state court decision on the status of the bonds. On September 9, 2003, the bankruptcy court held its final confirmation hearing and entered an order confirming the liquidation plan. On December 18, 2003, that court granted leave to proceed in the South Carolina courts in the underlying actions. Those proceedings progressed, as described above, but are not yet complete.

REASON FOR DENYING THE WRIT

This Court directed that this case be remanded to the South Carolina Supreme Court for further proceedings. The South Carolina Supreme Court then submitted the matter to the arbitrator for clarification as to whether he arrived at his interpretation of the arbitration clause independently, or whether the arbitrator actually disagreed with the state trial court but erroneously believed that he was bound by that court's view that the arbitration clause permitted class proceedings. The arbitrator has now made unmistakably clear that it was, and is, his own independent view that the clause permits class arbitration. The South Carolina Supreme Court correctly rejected petitioner's argument that this Court's mandate implicitly required the state high court to vacate the arbitral awards and lower court judgments confirming them. The petition for an extraordinary writ of mandamus is wholly baseless and should be denied.

Petitioner's liability for violating the South Carolina Consumer Protection Code has been conclusively determined in arbitration. The arbitrator has now repeatedly held that the governing arbitration clause permits class arbitration. Petitioner fails to establish any of the exceptional grounds for

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it ever was." Debtor's Obj. to Emerg. Mot. for Order Clarifying Automatic Stay, at 5 n. 2, *In re Conseco, Inc.*, No. 02 B 49672 (Bankr. N.D. Ill. filed July 9, 2003)

issuance of a writ of mandamus. Such a writ would amount to this Court taking the exceptional and unwarranted step of intruding into South Carolina's administration of its own courts, even before the state court proceedings are complete. Petitioner seeks mandamus, not to assure compliance with this Court's decision, but rather to upset a conclusive judgment against it so that it might contend that reinstatement of the judgment is unsecured, and is thus virtually nullified due to petitioner's bankruptcy liquidation. Even if petitioner were successful in obtaining vacatur, the arbitrator's decision would compel its immediate reinstatement, with the only difference being that petitioner would then argue that the reinstated judgment would be "new," unsecured, and more recent for purposes of calculating post-judgment interest. The writ should not be used to manipulate the formalities of state court procedure and undermine the substance of respondents' recovery, but should instead be denied.

I. THERE IS NO BASIS FOR THE EXTRAORDINARY REMEDY OF MANDAMUS.

Petitioner has shown no circumstances—let alone the "clear and indisputable" grounds—warranting mandamus. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976). "Because mandamus has 'the unfortunate consequence of making the judge a litigant,' the Court has stressed that it should be 'reserved for really extraordinary causes.'" *Pulliam v. Allen*, 466 U.S. 522, 538 (1984), *quoting*, *Ex Parte Fahey*, 332 U.S. 258, 260, (1947). A writ of mandamus is an extraordinary remedy only available when a petitioner demonstrates a threat of irreparable injury. *Graddick v. Newman*, 453 U.S. 928, 933 (1981). A party seeking issuance of a writ of mandamus must show that the grounds are "exceptional," his right to the writ

is "indisputable," and that he has "no other adequate means to attain the relief he desires." *Kerr,* 426 U.S. at 403; Sup. Ct. R. 20.1.

Petitioner is not threatened with irreparable injury or any other extraordinary circumstance that could justify mandamus. Petitioner contends that the South Carolina Supreme Court failed to execute the mandate of this Court insofar as it did not vacate the awards of the arbitrator or the state trial courts' judgments confirming them. Pet. 2. The state court's action complied with the mandate and is fully in accord with state law. The mandate sought only to discover whether the arbitrator had acted independently in reading the arbitration clause to permit class arbitration and, if he had not, to discover his independent view. The South Carolina Supreme Court, following full briefing on the state procedural questions, correctly carried out the mandate when it remitted the issue to the arbitrator, and the arbitrator's view is now clear.

To be entitled to mandamus, a party must establish that a clear and indisputable right is threatened by the lower court. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). If the mandate or judgment of the Supreme Court leaves a question open for the exercise of discretion by the lower court, the decision of the latter cannot be reversed by mandamus. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256 (1895); *In re Potts*, 166 U.S. 263, 265-266 (1897); *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). Petitioner cites to no rule of law, procedure or statute that clearly and undisputably establishes its right, or this Court's authority, to direct the procedures by which the South Carolina Supreme Court remitted the state law contract interpretation question to the arbitrator.

The state high court's decision to return the matter directly to the arbitrator is a matter of state procedural law and judicial discretion. Petitioner unsuccessfully made the same

argument to the South Carolina Supreme Court that it asserts here—that this Court's mandate not only vacated the South Carolina Supreme Court's order affirming the final arbitration awards, but that it also implicitly vacated the arbitral awards and the lower courts' judgments entering them as final orders. The state high court correctly rejected that contention.

Petitioner's request for a writ of mandamus is nothing more than an attempt to involve this Court in micro-managing the South Carolina Supreme Court's administration of the state court system. "This Court repeatedly has recognized that States have important interests in administering certain aspects of their judicial systems." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-13 (1987). This Court properly declined to interject itself into the state judicial process when it issued the mandate in this case. In this case, this Court gave no specific instructions to the South Carolina Supreme Court, other than to obtain a clear determination from the arbitrator.[6] The South Carolina Supreme Court, in turn, returned the matter to the arbitrator without interfering or attempting to interfere with the arbitral process. The absence in this Court's mandate of any direction to the state high court to vacate the underlying judgments is dispositive here.

The essence of the relief petitioner seeks is to (1) vacate the existing judgments; (2) require respondents to obtain a judgment that might be interpreted as "new," and thus arguably unsecured by the existing bonds and/or unable to support the accrued post-judgment interest; and (3) thereby to eviscerate respondents' recovery. Nothing in the mandate requires the additional relief petitioner seeks, and such relief

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[6] Compare, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)(vacating a judgment of the Ninth Circuit, remanding and instructing the Ninth Circuit to vacate the judgment of the District Court.).

would be antithetical to the actual result intended by the arbitrator and the state courts in this protracted litigation.

General Atomic Co., v. Felter, 436 U.S. 493 (1978) (per curiam) on which petitioner principally relies, fails to support mandamus in this case. There, the Court had earlier enjoined the state court, on Supremacy Clause grounds, from preventing General Atomic from asserting federal claims in federal forums. When the state court repeated that error on remand from this Court, the Court, although declining to issue a formal writ of mandamus, again disapproved the state court's effort to bar proceedings appropriate to federal judicial or arbitral forums. There is no similar error here of any state court acting beyond its constitutional authority in contravention of an earlier mandate. Petitioner's reliance on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is similarly misplaced. *See* Pet. 18. *Munsingwear* stands only for the proposition that a judgment may by eliminated in a moot case. If anything is moot in this case, it is petitioner's contention that the FAA or this Court's mandate are violated. Now that the arbitrator has more fully explained and reaffirmed the grounds for his original awards, there can be no dispute that petitioner has already obtained the contemplated enforcement of the arbitration clauses "according to their terms." Pet. App. 12a; *see* Pet. 21 (acknowledging that further proceedings after petitioner's desired vacation of the judgment "might result in new judgments that potentially could be reconciled with the requirements of the FAA"). Neither the mandate, state law, nor the FAA requires more.

II. THE PETITION IS PREMATURE AND SEEKS TO CIRCUMVENT THE ORDINARY APPELLATE PROCESS.

The extraordinary writ of mandamus does not serve as a substitute for the ordinary appellate procedures. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-383 (1953);

Heckler v. Ringer, 466 U.S. 602, 616 (1984). Such writs are only to be used when, for some special reason, the appellate process does not provide an adequate remedy. *Id.* Petitioner's request for the issuance of a writ of mandamus is an apparent attempt to circumvent the normal appellate process.

The state high court's order of February 20, 2004, was an order remanding the case to the arbitrator for further consideration consistent with this Court's opinion.[7] For the third time, the arbitrator has independently concluded that the arbitration clause permitted class arbitration. Petitioner has not yet appealed or otherwise challenged that ruling in the state system. If petitioner has a colorable complaint with regard to the arbitrator's decision, it should pursue it through the state court system. Were it to do so, it would be subject to the stringent limits on judicial review applicable to any decision issued in binding arbitration. *See Pittman Mortgage Company v. Edwards*, 327 S.C. 72, 76-77 (1997); *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509-510 (2001).

Petitioner instead comes to this Court with a spurious argument that a writ of mandamus must be issued, but mandamus cannot be employed to circumvent ordinary appellate procedures. The arbitrator has ruled and informed the South Carolina Supreme Court of his decision, but the

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[7] Petitioner had an opportunity to be heard before the arbitrator, and, if it believed additional submissions were necessary, it could have submited a brief or proposed order to the arbitrator outlining its position. It reasonably did not do so, however, because it had nothing new to say. As the arbitrator pointed out in his Supplemental Order, "the question of whether the subject arbitration clauses allowed for class arbitration has already been fully briefed and argued by the parties in the proceedings before me. Thus, I find no need for an additional hearing in order to render the decision required by the United States Supreme Court." Pet. App. 20a-21a. Petitioner's gratuitous innuendoes (*e.g.* Pet. 9, 21, 23) that the arbitrator's decision not to hear further evidence was improper, or that the arbitrator is somehow non-neutral, are baseless at best.

South Carolina Supreme Court has not yet acted on the arbitrator's decision.[8]

To interfere with the South Carolina Supreme Court before it issues its final order in this case would interfere with the principles of federalism established in *Younger v. Harris*, 401 U.S. 37 (1971). *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982). When the South Carolina Courts complete their proceedings, the parties can take any appropriate steps, as needed, to protect their rights. No extraordinary relief can be required of this Court at this time.

III. THE FEDERAL ARBITRATION ACT DOES NOT SUPPORT MANDAMUS

Petitioner argues that because this Court vacated the South Carolina Supreme Court's decision below, the FAA somehow requires vacation of the underlying arbitral awards and trial court judgments confirming them. This Court directed only that the South Carolina Supreme Court's opinion be vacated, and that further proceedings be held consistent with the Court's opinion. Nothing in the FAA, or in this Court's opinion or mandate, dictates how these proceedings be held.

It is well established that parties may contract for state law procedures to govern their arbitration agreement, *Volt Information Sciences, Inc. v. Board of Trustees of Leland*, 489 U.S. 468, 477 (1989), and in this case, the parties chose the

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[8] Petitioner has presented no evidence that the South Carolina Supreme Court has, or will, depart from the requirements of state law. State procedures delineate routes for obtaining clarification from trial courts or arbitrators without necessarily disturbing their judgments. Under its own rules, for example, the South Carolina Supreme Court may require a report "of a trial, or of any matter relative thereto" from a trial judge (in this case, the arbitrator). SCACR Rule 212(a). Such request for a report under Rule 212(a) does not require vacatur, but may, indeed, confirm the propriety of reaffirming an underlying judgment.

law of South Carolina.[9] "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Volt*, 489 U.S. at 479.[10] The South Carolina Supreme Court is free to employ whatever procedure it deems appropriate to comply with the Supreme Court's mandate in this case, as long as it is consistent with the FAA's goals of not frustrating private arbitrations. Remanding this case to the arbitrator was fully consistent with state procedures and the FAA's policies promoting arbitration.

Throughout its petition, petitioner repeatedly mischaracterizes the arbitration awards as having been entered in violation of the FAA, and this Court's decision as having so held. This Court made no such holding, nor could it have. To the contrary, its decision was premised on the recognition that an arbitrator's independent interpretation of an arbitration clause as permitting class arbitration fully *accords* with the FAA. Even the lack of clarity at the time of this Court's

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[9] Green Tree's adhesion contract provided: "You agree this contract will be governed by the law of the State of South Carolina." R. App. 2162; *see* Pet. App. 13a ("the parties agreed that South Carolina law would govern their arbitration agreement").

[10] The terms of Section 9 reinforce that principle, providing that "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award." In this case, the parties specified that "[j]udgments upon the award rendered may be entered in any court having jurisdiction." Pet. App. 6a. When Green Tree chose South Carolina state courts as a proper forum for post-arbitration proceedings, it subjected itself to the procedural rules and authority of that court system. Having received the benefit of its bargain—post arbitration procedures "in a court having jurisdiction"—Green Tree cannot now object to the procedures in the very court that it selected.

plenary review as to whether the arbitrator's decision was independent did not thereby place the arbitrator's decision in conflict with the FAA. Now that the arbitrator has made unmistakably clear that he read the clause to permit class arbitration, there can be no doubt that the requirements of the FAA have been met.

Furthermore, Sections 9 and 10 of the FAA, on which petitioner relies, do not govern state court proceedings; by their plain language, they apply only to federal courts. Section 9 provides for confirmation of arbitral awards by application "to the United States court in and for the district within which such award was made," and Section 10 provides that, in specified, narrow circumstances, "the United States court in and for the district wherein the award was made may make an order vacating the award." 9 U.S.C. §§ 9, 10. This Court has never held that Section 9 and 10 apply to arbitrations of purely state-law, nondiversity claims such as the claims in this case. *See Southland v. Keating*, 465 U.S. 1, 16 n. 10 (1984) (declining to hold that FAA Sections 3 and 4 apply to state arbitrations).[11]

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[11] Green Tree seeks to bootstrap itself into the coverage of Sections 9 and 10 by generally contending that the parties "agreement" is governed by the FAA. Pet. 22. The arbitration clause only states, however, that Section 1 of the FAA applies. Pet. Opp. 6a. Moreover, the South Carolina Supreme Court, in originally rejecting petitioner's challenges and affirming the award, never decided that Section 10 applied, but cited to both state and federal standards for approval of arbitration awards.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

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April 2, 2004

APPENDICES

APPENDIX A

Court of Common Pleas

00-CP-18-793

LYNN W. BAZZLE and BURT A. BAZZLE, in a class representative capacity on behalf of a class and for all others similarly situated,

Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION, n/k/a CONSECO FINANCE, INC.,

Defendants.

ORDER

This matter came before the Court on November 5, 2002, on the Plaintiffs' Motion to Execute on Bond and the Defendant's Motion to Stay Enforcement of Judgment in the above captioned matter. Appearing for the Plaintiffs were Steven W. Hamm, Esquire, Bradford P. Simpson, Esquire, and Mary L. Arnold, Esquire. Appearing for the Defendant were Herbert W. Hamilton, Esquire and Robert C. Byrd, Esquire. The Defendant moves to stay enforcement of the judgment in this case pending review of the Defendant's petition for a writ of certiorari filed with the United States Supreme Court on October 23, 2002, and beyond if the U.S. Supreme Court grants the petition. The Plaintiffs oppose the granting of a stay and seek to execute on the Supersedeas Bonds obtained in this case or, in the alternative, additional security by the Defendant in the form of a supplemental supersedeas bond pursuant to Rule 62(d), SCRCP.

After carefully reviewing and considering the memoranda and arguments of counsel, the Court finds that the Defendant's Motion shall be conditionally granted upon the Defendant's immediate deposit of $823,000.00 by wire transfer to an interest-bearing account, identified as *Bazzle v. Green Tree*, Civil Action Number 97-CP-18-258, to be established by Cheryl Graham, Clerk of Court for Dorchester County, at First Citizens Bank by noon on Friday, November 15, 2002, to cover interest accruing through January 15, 2003. The Defendant's timely compliance with this requirement shall stay enforcement of the judgment in this matter until January 16, 2003. The funds deposited into the aforesaid account pursuant to this Order, and the interest earned on such funds, shall not be withdrawn from the depositary institution without an Order of this Court authorizing such withdrawal. Notwithstanding the foregoing sentence, Counsel may continue to examine interest rates available at other insured financial institutions and the Clerk of Court is authorized to transfer funds deposited pursuant to this Order to such other financial institution as may provide a higher interest rate on such deposited funds.

This stay may be extended for a period of sixty (60) days by the Defendant's deposit of $401,799.00 by wire transfer into the above-referenced account at First Citizens Bank no later than noon on January 15, 2003. The Defendant may continue to extend this stay in such manner until such time as the U. S. Supreme Court finally disposes of this matter by depositing $401,799.00 by noon on the last day of this stay. Thus, the Defendant may extend this stay for sixty (60) days to March 16, 2002, by depositing $401,799.00 no later than noon on January 15, 2003. The stay could then be stayed further by the deposit of $401,799.00 by noon on March 16, 2002, and so on. If any deadline should fall on a day on which First Citizens Bank is not normally scheduled to

be open for business, the deadline shall be extended until noon on the next business day immediately following such deadline.

AND IT SO ORDERED!

/s/ Patrick R. Watts
Special Circuit Court Judge

November 6, 2002
Summerville, South Carolina

APPENDIX B

Court of Common Pleas

96-CP-06-0073

DANIEL B. LACKEY, GEORGE BUGGS and FLORINE BUGGS,
in a representative capacity on behalf of a class and
for all others similarly situtated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORP., *et. al.*
Defendants.

ORDER

This matter came before the Court on November 4, 2002, on the Defendant's Motion to Stay Enforcement of Judgment in the above captioned matter. Appearing for the Plaintiffs were Steven W. Hamm, Esquire, Bradford P. Simpson, Esquire, and Les Cotter, Jr., Esquire. Appearing for the Defendant was Herbert W. Hamilton, Esquire and Robert C. Byrd, Esquire. The Defendant moves to stay enforcement of the judgment in this case pending review of the Defendant's petition for a writ of certiorari filed with the United States Supreme Court on October 23, 2002, and beyond if the U.S. Supreme Court grants the petition. The Plaintiffs oppose the granting of a stay absent additional security by the Defendant in the form of a supplemental supersedeas bond pursuant to Rule 62(d), SCRCP.

This Court, on July 22, 2002, ordered the Defendant to provide a Supplemental Supersedeas Bond to cover accruing interest of approximately $1,022,000.00, for the period of March 22, 2002, to September 22, 2002, to provide adequate

security to the Plaintiffs on the appeal of this case to the South Carolina Supreme Court.

After carefully reviewing and considering the memoranda and arguments of counsel, the Court finds that the Defendant's Motion shall be conditionally granted upon the Defendant's immediate deposit of $1,022,000.00 by wire transfer to an account, identified by Civil Action Number 96-CP-06-073, to be established at Regions Bank by noon on November 5, 2002. This deposit shall be made pursuant to the July 22, 2002, Order issued by this Court and shall be deemed in compliance with that Order. In addition, this stay shall also be conditioned upon the Defendant's timely deposit of $773,900.53 by wire transfer to the same account at Regions Bank by noon on Monday, November 11, 2002, to cover interest accruing through January 15, 2003. The Defendant's timely compliance with these requirements shall stay enforcement of the judgment in this matter until January 16, 2003. Counsel may continue to examine rates available at other insured financial institutions and is authorized to transfer funds deposited pursuant to this Order to such other financial institution as may provide a higher rate on such deposited funds.

This stay may be extended for a period of sixty (60) days by the Defendant's deposit of $292,684.00 by wire transfer into the above-referenced account at Regions Bank no later than noon on January 15, 2003. The Defendant may continue to extend this stay in such manner until such time as the U. S. Supreme Court finally disposes of this matter by depositing $292,684.00 by noon on the last day of this stay. Thus, the Defendant may extend this stay for sixty (60) days to March 16, 2002, by depositing $292,684.00 no later than noon on January 15, 2003. The stay could then be stayed further by the deposit of $292,684.00 by noon on March 16, 2002, and so on. If any deadline should fall on a day on which Regions

Bank is not normally scheduled to be open for business, the deadline shall be extended until noon on the next business day immediately such deadline.

AND IT SO ORDERED!

/s/ Rodney A. Peeples
Circuit Court Judge

November 6, 2002
(nunc pro tunc for November 4, 2002)
Aiken, South Carolina

APPENDIX C

ON REMAND
SUPREME COURT OF SOUTH CAROLINA

U.S. Supreme Court 02-634

GREEN TREE FINANCIAL CORPORATION,
Appellant,

v.

LYNN W. BAZZLE *et al.*,
Respondents.

ORDER OF THE ARBITRATION ON REMAND

This matter was remanded to me from The Supreme Court of South Carolina in accordance with the decision of the United States Supreme Court in Green Tree Financial Corp. v. Bazzle, 123 S.Ct. 2402 (June 23, 2003). I wish to clarify my prior rulings that the arbitration clause contained in those adhesion contracts written by Green Tree were silent as to class certification in arbitration. The arbitration clause granted to the arbitrator "all powers provided by the law and the contract. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief, and injunctive relief." I applied South Carolina contract law in construing this broad arbitration clause drafted by Green Tree. I concluded that since the arbitration clause was silent as to class treatment that class certification was appropriate. I reached this decision independently in arbitration without influence from any other court ruling.

My orders in these arbitrations were based solely upon my own independent interpretation of Green Tree's consumer contracts and my own independent construction and application of South Carolina law.

For clarification only, I issue this Order *nunc pro tunc*, retroactive to my initial Order in Arbitration.

/s/ Tom J. Ervin Arbitrator
TOM J. ERVIN
ARBITRATOR

August 12, 2003
Greenville, South Carolina

APPENDIX D

THE SUPREME COURT OF SOUTH CAROLINA

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for others similarly situated

vs.

GREEN TREE FINANCIAL CORP., *et. al.*

DANIEL B. LACKEY, GEORGE BUGGS and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

vs.

GREEN TREE FINANCIAL CORP., *et. al.*

LETTER

August 6, 2003

Dear Mr. Ervin:

We have received the mandate in the above entitled matter. The United States Supreme Court remanded this case to this Court for further proceedings not inconsistent with the opinion of that Court. In light of this, the matter is being returned to you as arbitrator for further proceedings. Any issues relating to the bond in connection with this should be given to Judge Peeples who is the circuit court judge that has been appointed by the Chief Justice to hear any matters pertaining to the bond.

Very truly yours,

/s/ Brenda F. Shealy
Deputy Clerk

cc: The Honorable Rodney A. Peeples

(3)

No. 03-1243

Supreme Court, U.S.
FILED
APR 13 2004
CLERK

IN THE

Supreme Court of the United States

IN RE GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

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REPLY BRIEF

Respondents do not dispute that if this Court, in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), held that the arbitration awards had been entered in violation of the Federal Arbitration Act ("FAA"), the South Carolina Supreme Court would have been compelled on remand to set those awards aside as a matter of federal law. Instead, the entirety of Respondents' Opposition to the Petition for Mandamus ("Opp.") depends upon their assertion that "this Court did not hold that the arbitration awards violated the FAA," Opp. 2, and merely "remanded for further proceedings to *clarify* the arbitrator's decision," *id.* at 6 (emphasis added). That position is demonstrably wrong.

In its decision last Term, this Court vacated a judgment of the South Carolina Supreme Court that affirmed the class-wide arbitral awards entered in the *Bazzle* and *Lackey* proceedings. Pet. App. 12a. This Court vacated the South Carolina Supreme Court's judgment because, after canvassing the record, it concluded (in a holding studiously avoided by respondents), that "[w]ith respect to this underlying question—whether the arbitration contract forbids class arbitration—the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.* at 11a. Because Green Tree had not received the arbitrator's decision mandated by the FAA, this Court vacated the judgment below and remanded "the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms." *Id.* at 12a (citing 9 U.S.C. § 2 and *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989)).

In an effort to avoid this clear holding, respondents must rewrite this Court's decision. Contrary to their argument, this Court did not remand "for further proceedings to *clarify* the arbitrator's decision." Opp. 6 (emphasis added). Rather, it

vacated the judgment affirming the arbitral awards because the parties' agreements had not been enforced in accordance with their terms and remanded so that "the arbitrator may decide the question of contract interpretation." Pet. App. 12a.

More fundamentally, respondents' position that this Court vacated the South Carolina Supreme Court's judgment *without* concluding that the underlying class-wide arbitral awards violated federal law is directly contrary to settled law explicating the power of this Court to review state court judgments. As this Court explained long ago: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); accord *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985); *Ridgway* v. *Ridgway*, 454 U.S. 46, 54 (1981). That is, this Court could not have set aside the state-court judgment affirming arbitral awards *unless* it determined that those arbitral awards were entered in violation of the FAA. That, of course, is precisely what this Court held in ruling that the parties' agreements had not been enforced in accordance with their terms. Pet. App. 11a, 12a.

In reaching that conclusion, this Court rejected respondent's argument – which they repeat here – that the arbitrator independently made the necessary predicate class-action determinations. In *Bazzle*, this Court relied upon the South Carolina Supreme Court's ruling that "the '*trial court*' issued 'an order granting class certification'" and rejected respondents' denial of that conclusion because it could "find no convincing record support for that denial." Pet. App. 11a (emphasis added). In *Lackey*, the Court noted that the record was "less clear" than in *Bazzle*, but ultimately held that, as to both proceedings, "the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.*[1]

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[1] Respondents seek to reargue this point by insisting that this Court's holding was contrary to arguments made below by Green Tree. Opp. 5

Further, the fact that there could be further proceedings in the state courts does not render mandamus relief "premature." Opp. 14. To the contrary, when a party has been denied the benefit of this Court's mandate, that party need not "go through that entire process again to obtain execution of the judgment of this Court." *General Atomic Co.* v. *Felter*, 436 U.S. 493, 497 (1978) (per curiam).

Nor has the need for mandamus relief been rendered "moot," Opp. 14, merely because the arbitrator has denied Green Tree an opportunity to present its position and instead rubber-stamped a proposed order submitted by respondents that repeats the same arguments rejected by this Court. Without mandamus relief, Green Tree may be obligated to pay more than $8 million in post-judgment interest on arbitral awards that it challenged and that this Court held were entered in violation of the FAA. Pet. App. 11a, 12a. Vacatur of the arbitral awards would do away with any claim to post-judgment interest and further would require respondents to obtain and confirm new judgments before they could seek recovery from the bankruptcy estate. Opp. 3, 11. Respondents seek to avoid that result, but provide no reason that they should be exempt from the execution of this Court's mandate or from the operation of the bankruptcy laws.

Neither respondents nor the court below can justify their refusal to enforce this Court's mandate by arguing that it would "be antithetical to the actual result intended by the arbitrator and the state courts in this protracted litigation." Opp. 14. Federal law controls. And, as explained by this

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n.2. In doing so, respondents ignore that, in the court below, they argued that the "Trial Court" in *Bazzle* "applied state law when determining class certification and class arbitration." Final Br. of Resps., at 18, *Bazzle* v. *Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed Dec. 3, 2001). And, in *Lackey*, as this Court noted, respondents argued that "'to the extent' the arbitrator decided that the contracts permitted class procedures . . . 'it was a reaffirmation and/or adoption of [the *Bazzle* c]ourt's prior determination.'" Pet. App. 12a (alteration in original).

Court, the class-wide awards violated the FAA because they were entered without a determination by an arbitrator that the parties' contracts permitted class-wide arbitration. Pet. App. 11a, 12a. Refusal by the court below to vacate those awards violates this Court's mandate and warrants mandamus relief.

I. A WRIT OF MANDAMUS IS NECESSARY TO ENSURE COMPLIANCE WITH THIS COURT'S MANDATE.

Respondents nowhere dispute that mandamus relief is proper where a lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning." *United States* v. *Fossatt*, 62 U.S. (21 How.) 445, 446 (1858); see also *General Atomic*, 436 U.S. at 497. Respondents argue instead that the South Carolina Supreme Court was not obligated "to vacate the arbitral awards and lower court judgments confirming them," Opp. 10, because this Court's mandate only required "further proceedings to clarify the arbitrators' [sic] decision," *id.* at 6; see also *id.* at 10, 12. As a result, they insist that the court below fulfilled this Court's mandate when it refused to vacate the arbitral awards and "submitted the matter to the arbitrator for clarification." *Id.* at 10. These arguments cannot be reconciled with this Court's holding.

This Court's decision did not seek "clarification" of anything. Instead, this Court vacated the South Carolina Supreme Court's decision affirming the class-wide arbitral awards at issue in this case. Pet. App. 12a. It did so because, on the predicate issue whether the parties' contracts permitted class-wide arbitration, the Court concluded, point blank, that "the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.* at 11a. As a result, this Court remanded the case not for "clarification," as respondents argue, Opp. 6, 10, but "so that the arbitrator may decide the question of contract interpretation," Pet. App. 12a.

This Court explained that its ruling was compelled by the FAA, which requires that "parties' arbitration agreements" be

enforced "according to their terms." Pet. App. 12a. Only by ignoring that holding can respondents claim that there is "no rule of law . . . that clearly and indisputably establishes [Green Tree's] right" to vacatur of the arbitral awards. Opp. 12. Simply put, this Court vacated the judgment below because the class-wide arbitral awards violated the FAA, which requires that "arbitration agreements" be enforced "according to their terms," Pet. App. 11a.

Respondents suggest that this Court did not hold that "the arbitration awards" were "entered in violation of the FAA." Opp. 17. Indeed, respondents insist that "[t]his Court made no such holding, nor could it." *Id.* That argument is wrong not only because it ignores this Court's decision, but also because it fails to recognize this Court's limited authority over state-court judgments. As explained by Justice Jackson, the Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights"; that is, the Court's "power is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at 125-26 (citing cases); accord *Ake*, 470 U.S. at 75; *Ridgway*, 454 U.S. at 54; *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977). As a result, this Court's only authority to set aside the state court's judgment affirming the class-wide arbitral awards was based upon the conclusion that the arbitral awards violated federal law as set forth in the FAA. Pet. App. 11a-12a. Put another way, absent a determination that the arbitral awards were entered in violation of the FAA, this Court would have been without authority to vacate the South Carolina Supreme Court's judgment affirming those awards.

Finally, respondents contend that the "absence in this Court's mandate of any direction to the state high court to vacate the underlying judgments is dispositive here." Opp. 13. That argument, however, is simply a variation on respondents' misreading of this Court's opinion. The mandate expressly incorporates this Court's opinion, and that

opinion held that the arbitral awards were contrary to the requirements of federal law as reflected in Section 2 of the FAA. Pet. App. 11a-12a. Because the arbitration awards violated the FAA, the South Carolina Supreme Court was not entitled, either as a matter of "discretion" or "administration of its own courts" to refuse to give effect to this Court's determination that federal law had been violated. Thus, mandamus is necessary not for the purpose of "micro-managing" the state courts, but to ensure that this Court's mandate is given its full effect. See *General Atomic*, 436 U.S. at 496; *Fossatt*, 62 U.S. (21 How.) at 446.

II. A WRIT OF MANDAMUS IS BOTH TIMELY AND APPROPRIATE TO PROTECT THE RIGHTS OF GREEN TREE UNDER THE FAA.

Respondents' argument that mandamus relief should be denied because it would be both "premature" and "moot," Opp. 14, does not withstand scrutiny.

1. There can be no question that mandamus is not "premature." On remand from this Court, Green Tree sought enforcement of the mandate by explaining to the South Carolina Supreme Court that the arbitral awards at issue in these proceedings violated the FAA and must be vacated. In its February 20, 2004 decision, the South Carolina Supreme Court questioned whether Green Tree had "prevailed" in this Court, declined to follow an unbroken line of its own precedent, and refused to vacate the judgments confirming the arbitral awards. Pet. App. 3a.[2] Respondents contend that mandamus is premature because the South Carolina courts

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[2] Even though this Court vacated the lower court judgment that they sought to defend, respondents too suggest that Green Tree did not prevail because this Court did not accept all Green Tree's positions. Opp. 4. In doing so, respondents ignore that the Court, through Justice Breyer, expressly rejected their contention that the arbitral awards were consistent with the FAA because the arbitrator had actually determined that the parties' agreements authorized class-wide arbitration. Pet. App. 11a.

have not "complete[d] their proceedings," Opp. 16, and thus the request for mandamus "is an apparent attempt to circumvent the normal appellate process," *id.* at 15.[3]

This Court, however, has rejected this very same argument in *General Atomic*, 436 U.S. at 497. There, this Court explained that "[a] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Id.* Under *General Atomic*, Green Tree should not be required to run through an entire round of appeals to obtain execution of the mandate to which this Court ruled Green Tree was entitled.

Respondents' efforts to distinguish *General Atomic* are specious. Respondents contend, in vague generalities, that *General Atomic* involved a state court that was "acting beyond its constitutional authority in contravention of an earlier mandate" and that "[t]here is no similar error here." Opp. 14. At issue in *General Atomic* was an effort by a litigant to secure its rights to have an arbitration in accordance with "the arbitration clause" in its agreement as guaranteed by the Federal Arbitration Act. 436 U.S. at 494. The refusal of the state court to allow that federally protected arbitration violated the FAA and therefore was contrary to the Supremacy Clause. *Id.* at 496-97. Like *General Atomic*, in this case, the South Carolina Supreme Court's refusal to vacate arbitral awards that this Court explained were entered in violation of the FAA fails to give effect to this Court's mandate and denies Green Tree its rights under the FAA.

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[3] Respondents do not suggest that Green Tree can obtain relief from the lower courts. Indeed, the South Carolina Supreme Court recently denied Green Tree's request for a stay pending this Court's resolution of the petition for mandamus. Further, the trial court in *Lackey* ordered that the superseadeas bond securing the original judgment be paid out after that court refused to allow Green Tree an opportunity to show that this Court's decision vacated the judgment entered in the *Lackey* proceeding.

2. Respondents also are wrong in suggesting that the petition for mandamus is somehow "moot," Opp. 14, because the "arbitrator has now made unmistakably clear that it was, and is, his own independent view that the clause permits class arbitration," *id.* at 10.

First, there can be no question that the petition for mandamus has not been rendered "moot" by the arbitrator's rubber-stamp of respondents' proposed order. Opp. 14. As Green Tree explained previously, the lower court's refusal to vacate the arbitral awards has dire, real-world consequences for Green Tree. Pet. 21. Indeed, after Green Tree posted multi-million dollar bonds so that it could challenge the judgments confirming these arbitral awards and after prevailing before this Court in establishing that these arbitral awards violated the FAA, respondents argue that these invalid arbitral awards should be kept in place by pretending that this Court's decision never occurred.

To be sure, after concluding that the original arbitral awards were entered in violation of the FAA, Pet. App. 11a, this Court remanded for further proceedings in which "the arbitrator may decide the question of contract interpretation." *Id.* at 11a, 12a. At most, that would allow the arbitrator to issue "new" arbitral awards based upon his view of what the parties' agreements require. Thereafter, respondents could seek to confirm those awards and thereby convert them into enforceable judgments, see 9 U.S.C. § 9, while Green Tree might seek to vacate those awards, *id.* § 10. Respondents struggle to avoid the normal operation of the FAA – which the parties expressly agreed would govern their agreements to arbitrate, Pet. App. 6a – because respondents would not be entitled to recover the more than $8 million dollars of post-judgment interest that has accrued on arbitral awards that this Court ruled were invalid under the FAA.[4]

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[4] Respondents argue that their agreements incorporate only the definitional section of the FAA, 9 U.S.C. § 1, but not its substantive

What is more, respondents acknowledge that if they are required (and able) to convert new arbitral awards into new judgments, those judgments will not be secured by existing bonds, and therefore they will need to seek payment through the bankruptcy court. In this regard, respondents nowhere explain why they should be exempted from the operation of the bankruptcy laws. And they never explain why their claims for statutory damages (for which there was no showing of *actual* damage) and their multi-million dollar attorneys' fees awards (which translate to more than $900 for every attorney hour) should be preferred over the claims of other creditors seeking recovery from the bankruptcy estate.

Finally, it is simply not the case that "if petitioner were successful in obtaining vacatur, the arbitrator's [most-recent] decision would compel [their] immediate reinstatement" of the vacated judgments. Opp. 11. Any new arbitral award would be subject to judicial scrutiny *before* it could become an enforceable judgment. 9 U.S.C. § 10(a). Recognizing that arbitral awards can be vacated where there is "evident partiality or corruption," *id.* § 10(a)(2), respondents argue that the arbitrator's initial effort to enter an order on their behalf in direct violation of a bankruptcy court stay was excusable because Green Tree did not inform the arbitrator of the stay. Opp. 7 n.4. That is false. Green Tree expressly told the arbitrator "that the automatic stay is still in place and that any efforts to pursue a claim against the Debtor in bankruptcy constitutes a violation of that stay." Letter from Herbert W. Hamilton to Thomas J. Ervin, Arbitrator (faxed on Aug. 11, 2003). Despite that notice, the arbitrator violated the stay so

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provisions, *id.* §§ 2-16. Opp. 18 & n.11. They offer no explanation to justify that absurd construction and ignore that their argument was rejected by the South Carolina Supreme Court in a decision they never cross-petitioned to challenge. *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 355 n.9 (S.C. 2002). Indeed, the South Carolina Supreme Court applied Section 10 of the FAA to assess Green Tree's original challenge to the arbitral awards. *Id.* at 361.

that he could adopt respondents' initial proposed order. Pet. 8-10.

Recognizing that arbitral awards also can be vacated where the arbitrator refused to hear evidence, 9 U.S.C. § 10(a)(3), respondents must argue that Green Tree "had an opportunity to be heard before the arbitrator" but "had nothing new to say." Opp. 15 n.7. That again is false. Green Tree informed the arbitrator that it opposed "entry of the proposed Order" submitted by respondents and requested a "conference call for the purpose of establishing a schedule for briefing, a hearing, and any related proceedings" on remand from this Court. Letter from B. Rush Smith III to Thomas J. Ervin, Arbitrator (faxed Feb. 23, 2004). At this conference call, the arbitrator thumbed his nose at this Court's remand by informing Green Tree that there would be no further proceedings, and, within the hour, faxed his most-recent adoption of respondents' proposed "nunc pro tunc" order to the South Carolina Supreme Court.

Finally, Green Tree would be entitled to challenge the arbitrator's wholesale "nunc pro tunc" adoption of the arguments – at the insistence of respondents – that the arbitrator previously had decided the class-action issue in the *Bazzle* and *Lackey* proceedings. Pet. App. 20-22a (Supplemental Order in Arbitration). Of course, this Court already has ruled, after reviewing the same record evidence and the prior decision of the South Carolina Supreme Court, that "the parties have not yet obtained the arbitration decision that their contracts foresee." Pet. App. 11a.

Because this Court ruled that the class-wide arbitral awards violated the FAA, Pet. App. 11a, 12a, and because the lower court has refused to vacate those awards, *id.* at 3a, mandamus is necessary to enforce this Court's mandate.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of mandamus should be granted.

Respectfully submitted,

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